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# CASES

ON THE

# LAW OF SALES OF GOODS

SELECTED FROM DECISIONS OF

## ENGLISH AND AMERICAN COURTS

BY

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AMERICAN CASEBOOK SERIES
JAMES BROWN SCOTT
GENERAL EDITOR

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# THE AMERICAN CASEBOOK SERIES

FOR years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly; principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year.
  2d "
  3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical, and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession have written or are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

Frederic C. Woodward, Dean of the Stanford University Law School. *Subject, Sales.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

James Brown Scott,
General Editor.

Washington, D. C., July, 1913.

Following are the books of the Series now published, or in press:

Administrative Law
Bills and Notes
Carriers
Conflict of Laws
Corporations
Criminal Law
Criminal Procedure
Damages
Partnership
Persons
Pleading
Sales
Suretyship
Trusts
Wills and Administration

# PREFACE

INASMUCH as there are a number of comprehensive and reliable treatises on the law of Sales, I have deemed it unnecessary to attempt, by the elaborate citation of authorities, to show the precise state of the law, either upon questions considered in the selected cases or upon subordinate or related points. In the main, therefore, the notes consist of references to cases which, though for one reason or another not selected for reprinting, seem to me to be of particular importance or interest.

My task has been incalculably diminished, of course, by the standard treatises on the subject and by previous casebooks, and I desire to acknowledge in particular my indebtedness to the works of Benjamin, Mechem and Williston.

F. C. W.

Stanford University, California, May 2, 1913.

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# CASES ON THE LAW OF SALES

## CHAPTER I

## SUBJECT-MATTER OF THE CONTRACT

### HASTIE v. COUTURIER.

(Court of Exchequer Chamber, 1853. 9 Exch. 102.)

The plaintiffs were merchants at Smyrna; the defendants were corn factors in London; and this action was brought to recover from them the price of a cargo of Indian corn, which had been shipped at Salonica, on board a vessel chartered by the plaintiffs for a voyage to England, and had been sold in London by the defendants in error, upon a del credere commission. The purchaser, under the circumstances hereafter stated, had repudiated the contract.

In January, 1848, the plaintiffs chartered a vessel at Salonica, to bring a cargo of 1,180 quarters of corn to England. On the 8th of February a policy of insurance was effected on "corn, warranted free from average, unless general, or the ship be stranded." On the 22d of that month, the master signed a bill of lading, making the corn deliverable to the plaintiffs, or their assigns, "he or they paying freight, as per charter-party, with primage and average accustomed." On the 23d February, the ship sailed on the homeward voyage. On the 1st May, 1848, Messrs. Bernouilli, the London agents of the plaintiffs, and the persons to whom the bill of lading had been indorsed, employed the defendants to sell the cargo, and sent them the bill of lading, the charter-party, and the policy of insurance, asking and receiving thereon an advance of £600.

On the 15th May the defendants sold the cargo to A. B. Callander, who signed a bought note, in the following terms: "Bought of Hastie & Hutchinson, a cargo of about 1,180 (say eleven hundred and eighty) quarters of Salonica Indian corn, of fair average quality when shipped per the Kezia Page, Captain Page, from Salonica; bill of lading dated twenty-second February, at 27s. (say twenty-seven shillings) per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders; measure to be calculated as customary; payment at two months from this date, or in cash, less discount, at the rate of five per cent. per annum for the unexpired time, upon handing shipping documents."

In the early part of the homeward voyage, the cargo became so heated that the vessel was obliged to put into Tunis, where, after a survey and other proceedings, regularly and bona fide taken, the cargo was, on the 22d April, unloaded and sold. It did not appear that either party knew of these circumstances at the time of the sale. The contract having been made on the 15th of May, Mr. Callander, on the 23d of May, wrote to Hastie & Hutchinson: "I repudiate the contract of the cargo of Indian corn, per the Kezia Page, on the ground that the cargo did not exist at the date of the contract, it appearing that the news of the condemnation and sale of this cargo at Tunis, on the 22d April, was published at Lloyd's, and other papers, on the 12th instant, being three to four days prior to its being offered for sale to me."

The plaintiffs afterwards brought this action. The declaration was in the usual form. The defendants pleaded several pleas, of which the first four are not now material to be considered. The fifth plea was that before the sale to Callander, and whilst the vessel was on the voyage, the plaintiffs sold and delivered the corn to other persons, and that since such sale the plaintiffs never had any property in the corn or any right to sell or dispose thereof, and that Callander on that account repudiated the sale, and refused to perform his contract, or to pay the price of the corn. Sixthly, that before the defendants were employed by the plaintiffs, the corn had become heated and greatly damaged in the vessel, and had been unloaded by reason thereof, and sold and disposed of by the captain of the said vessel on account of the plaintiffs at Tunis, and that Callander, for that reason, repudiated the sale, etc.

The cause was tried before Mr. Baron Martin, when his Lordship ruled that the contract imported that at the time of the sale, the corn was in existence as such, and capable of delivery, and that as it had been sold and delivered by the captain before this contract was made, the plaintiffs could not recover in the action. He therefore directed a verdict for the defendants. The case was afterwards argued in the Court of Exchequer before the Lord Chief Baron, Mr. Baron Parke, and Mr. Baron Alderson, when the learned Judges differed in opinion, and a rule was drawn up directing that the verdict found for the defendants should be set aside on all the pleas, except the sixth, and that on that plea judgment should be entered for the plaintiffs, non obstante veredicto; that the defendants should be at liberty to treat the decision of the Court as the ruling at nisi prius, and to put it on the record and bring a bill of exceptions. 8 Exch. 40. This was done, and the Lord Chief Baron sealed the bill of exceptions, adding, however, a memorandum to the effect that he did so as the ruling of the Court, but that his own opinion was in opposition to such ruling.

The case was argued on the bill of exceptions in the Exchequer Chamber, before Justices Coleridge, Maule, Cresswell, Wightman, Williams, Talfourd, and Crompton, who were unanimously of opinion that the judgment of the Court of Exchequer ought to be reversed. 9 Exch. 102. The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Alderson, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, and Mr. Baron Bramwell attended.[1]

Coleridge, J.[2] The case was originally tried before Martin, B., who, in directing the jury ruled that the contract imported that, at the time of the sale, the corn was in existence as such, and capable of delivery, and a verdict was found for the defendants, the plaintiffs having leave to move to enter a verdict in their favour on all the issues except those on the fifth and sixth pleas, and on those pleas for judgment non obstante veredicto. The case was argued before the Lord Chief Baron and Barons Parke and Alderson. The lord chief baron agreed in the opinion expressed by Martin, B., at nisi prius; but the other learned barons differed from him, and made the rule absolute; whereupon it was agreed that the question should be brought before this court on a bill of exceptions, as if the lord chief baron had directed the jury in conformity with the opinion of Barons Parke and Alderson. The case therefore comes before us without any great preponderance of authority in favour of the defendants in error. Nor do we find in the arguments of counsel, or in the judgment of the court below, any case referred to upon which that judgment was founded. It turned entirely on the meaning of the contract made between the parties, which was in these terms: "Bought of Hastie & Hutchinson a cargo of about 1180 quarters of Salonica Indian corn of fair average quality when shipped per the 'Kezia Page,' Captain Page, from Salonica, bill of lading dated the 22d of February, at 27s. per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders, measure to be calculated as customary, payment at two months from this date, or in cash, less discount at the rate of £5 per cent. per annum for the unexpired time upon handing shipping documents." An attempt was made to explain this document by evidence, but failed. There is, indeed, an expression in the bill of exceptions, "that the meaning of free on board is, that the goods are on board," which, taken literally, may import that they are on board at the time when the words are used; but it was not contended for the plaintiffs in error that such is the true meaning. The case, therefore, is not affected by that statement, and the question depends upon the words of the contract, unexplained by any evidence.

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[1] This statement of the facts and pleadings is taken from the report of the case in the House of Lords (5 H. L. C. *673), where the judgment of the Exchequer Chamber was affirmed.

[2] In the Exchequer Chamber.

For the plaintiffs in error it was contended, that the parties plainly contracted for the sale and purchase of goods, that the price to be paid was for goods, and that for the price the purchaser was to have the benefit of a contract to carry them and a policy of insurance; that a vendor of goods undertakes that they exist, and that they are capable of being transferred, although he may not stipulate for their condition; and that as the goods in question had been sold and delivered to other parties before the contract in question was made, there was nothing on which it could operate; and Barr v. Gibson, 3 M. & W. 390, and Strickland v. Turner, 7 Exch. 208, were cited.

On the other hand it was argued, that this was not a mere contract for the sale of an ascertained cargo, but that the purchaser bought the adventure, and took upon himself all risks from the shipment of the cargo. It was said that the mention of the condition of the cargo at the time of shipment was a proof of the intention of the parties that the buyer should take all risks from that time; that its condition at the time of sale, or the fact of its existence, could not then be ascertained, and therefore the purchaser must be supposed to have taken the risks; that if it had existed, however much deteriorated, the purchaser must have taken it, although the loss had been all but total, and therefore there was no reason for excluding total loss from the risks that he was to bear; that if it had ceased to exist the consideration would not fail, for the purchaser would have the shipping documents. It was further argued that the stipulation for payment, which would probably have to be made before the arrival of the cargo, indicated an intention that the purchaser was in all events to pay for it, on account of the inconvenience that would ensue if he might have to reclaim the money back. It was not disputed that the cases of Barr v. Gibson and Strickland v. Turner were well decided.

It appears to us that the contract in question was for the sale of a cargo supposed to exist, and to be capable of transfer, and that, inasmuch as it had been sold and delivered to others by the captain before the contract in question was made, the plaintiffs cannot recover in this action. With regard to the description of the cargo as "of fair average quality when shipped," we think that, if those words had not been introduced, it must have been held that the purchaser of a cargo on a voyage would take upon himself the chance of what its condition at the time of purchase might be, and that this clause was introduced for his benefit, by enabling him to object, if the fact were so, that the cargo was bad when shipped. If, in Barr v. Gibson, there had been a stipulation that the ship, when she sailed on the voyage during which she was sold, was seaworthy, that would not have made the purchaser liable, if a total loss had occurred before the contract was entered into. It has been said, that if the loss had been all but total, if the cargo had become all but worthless, yet, if it existed in specie, the purchaser must unquestionably have been bound, and therefore there is no reason for holding that he was not also to take the risk of a total loss. The same argument would have applied in Strickland v. Turner. If the annuitant, at the time of the sale of the annuity, had been in extremis, and had died the next hour, the purchaser would have been bound and could not have recovered the purchase money, but was held to be so entitled, the annuitant having died before the sale. Again, it has been supposed that there is an inconsistency in saying that, if the cargo had sustained sea damage, constituting an average loss covered by the policy, it would pass to the purchaser so as to secure to him an indemnity, but would not pass in the event of a total loss. This seems to depend upon the same point, and not to be attended with any real difficulty.

If the contract for sale of the cargo was valid, the shipping documents would pass as accessories to it; but if, in consequence of the previous sale of the cargo, the contract failed as to the principal subject-matter of it, the shipping documents would not pass. Although we cannot find any decision in point, there is a case of Sutherland v. Pratt, 11 M. & W. 296, where this subject was mentioned. In that case, the plaintiff had bought goods on a voyage, and effected an insurance, lost or not lost. They had sustained sea damage before the sale, and the purchaser sued on the policy. The underwriters pleaded that the goods were damaged before the plaintiff had acquired any interest in them. On demurrer, it was held that the plea was bad; but the very learned counsel who argued for the plaintiff admitted, in answer to a question put by Parke, B., that if the goods had been totally lost before his contract of purchase was made, there would not have been an insurable interest, as a person cannot buy a thing that has been totally lost.

For these reasons, it appears to us that the basis of the contract in this case was the sale and purchase of goods, and that all the other terms in the bought note were dependent upon that, and that we cannot give to it the effect of a contract for goods lost or not lost. The consequence is, that the judgment of the court below must be reversed, and entered for the plaintiffs in error according to arrangement between the parties.

Judgment reversed.

## GRANTHAM v. HAWLEY.

(Court of Common Pleas, 1616. Hob. 132.)

Robert Grantham brought an action of debt upon an obligation of forty pounds against Edward Hawley, the condition whereof was, that if a certain crop of corn growing upon a certain piece of ground, late in the occupation of Richard Sankee, did of right belong to the plaintiff, then the defendant should pay him for it twenty pounds. Now the case upon the pleading and demurrer fell out thus; that one Sutton was seised of the land, and 30 Eliz. in April, made a lease of it to Richard Sankee for twenty-one years by indenture, and did thereby covenant, grant to and with Sankee, his executors and assigns, that it shall be lawful for him to take and carry away, to his own use, such corn as should be growing upon the ground at the end of the term. Then Sutton conveyed the reversion to the plaintiff; and John Sankee, executor to Richard, having sowed the corn, and that being growing upon the ground at the end of the term, sold it to the defendant. And it was argued by Hutton for the plaintiff, that it was merely contingent whether there should be corn growing upon the ground at the end of the term, or not. Also, the lessor never had property in the corn; and therefore could not give nor grant it, but it sounded properly in covenant; for the right of the corn standing in the end of the term being certain, accrues with the land to the lessor; and it was said to be adjudged. And it was agreed by the court that if A., seised of land, sow it with corn, and then convey it away to B. for life, remainder to C. for life, and then B. die before the corn reapt; now C. shall have it, and not the executors of B., though his estate was uncertain. Note, the reason of industry and charge in B. fails; yet judgment in this case was given against the plaintiff, that is, that the property and very right of the corn, when it happened, was past away; for it was both a covenant and a grant. And therefore if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Now though corn be fructus industrialis, so that he that sows it may seem to have a kind of property, ipso facto, in it, divided from the land; and therefore the executor shall have it, and not the heirs; yet in this case, all the colour that the plaintiff hath to it, is by the land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 Hen. VI. A parson may grant all the tithe wool that he shall have in such a year; yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially. And though the words are here not by words of gift of the corn, but that it shall be lawful for him to take it to his own use, it is as good to transfer the property; for the intent and common use of such words, as a lease without impeachment of waste, for the like reason, and not ex vi termini, gives the trees.

## ARQUES v. WASSON.

(Supreme Court of California, 1877. 51 Cal. 620, 21 Am. Rep. 718.)

CROCKETT, J. The action is replevin to recover from the sheriff certain grain and flax seed seized and sold by him under an attachment and execution against one Hansen. The findings show that Hansen leased from the plaintiffs a parcel of land, and from one Reed an adjoining parcel, of both of which he was in possession under the leases; that to secure the rent to be paid to the plaintiffs, and also a store account which he owed them, he duly executed and delivered to them a mortgage (which was duly recorded), upon all the crops of every kind to be produced on said lands during the next ensuing cropping season; that at the date of the mortgage Hansen was in possession of the land, but had not then plowed it or sowed the seed, but proceeded to do so very soon thereafter and produced the crop which is in controversy; that when the crop had matured and had been partially harvested, it was seized by the defendant as sheriff, under an attachment at the suit of another creditor of Hansen, and was subsequently sold by the defendant under an execution issued upon the judgment in said action. The plaintiff recovered and the defendant appeals.

The point chiefly relied upon for a reversal is, that at the date of the mortgage the crop had not even a potential existence, the ground not having been plowed or the seed sown; and it is claimed that there can be no valid mortgage of a thing not in esse. It is conceded by counsel that if the thing has a potential existence, as, for example, wool to be grown from sheep then belonging to the mortgagor, or butter to be thereafter produced from his cows, or a crop arising from seed already sown, the mortgage would be valid. The general rule undoubtedly is that a person cannot convey a thing not in esse, or in which he has no present interest. But it is quite as well settled, that if the thing has a potential existence it may be mortgaged or hypothecated. "If one, being a person, give to another all the wool he shall have for tithes the next year, this is a good grant, although none may arise, for the tithes are potentially in the person. * * * So one may grant all the wool of his sheep for seven years; but not of the sheep which he shall thereafter purchase." Van Hoozer v. Cory, 34 Barb. (N. Y.) 12, and authorities there cited. "Land is the mother and root of all fruits. Wherefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant." Grantham v. Hawley, Hob. R. 132. In Van Hoozer v. Cory, supra, the court holds that "the same principle is adjudged applicable to the annual crops, the fruit of the annual labor of the lessee, as if a lessor covenants that it shall be lawful for the lessee, at the expiration of the lease, to carry away the corn growing on the premises, although by possibility there may be no corn growing at the expiration of the lease, yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant." So there may be a valid grant of the grain that a field is expected to grow. 1 Parsons on Cont. 523; McCarty v. Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262. In Van Hoozer v. Cory, supra, the grant was of the cheese expected to be made from the cows of the grantor, and "the products expected to be raised upon the premises then demised to the grantor"; and this was held to be a valid grant.[2] In that case the question involved here was carefully considered by the court upon a full examination of the authorities, and we are satisfied with the conclusion to which it arrived. But the same question arose in the later case of Conderman v. Smith, 41 Barb. (N. Y.) 404, in which the ruling in Van Hoozer v. Cory was approved; and Johnson, J., in delivering the opinion of the court, said: "That case (Van Hoozer v. Cory) like this, was an action by the lessor and purchaser, against a creditor of the lessee, who had taken and sold the products of the farm and dairy upon execution; and the court held that it did not fall within the rule which prohibits the selling or mortgaging of property not in existence, or not owned by the vendor or mortgagor. It was the product of property which the vendor owned at the time, and was, as it is expressed in the books, potentially his, and, therefore, the subject of sale." On the rule established in these cases, the crop mortgaged to the plaintiffs had a potential existence, and the mortgage was valid.

Judgment and order affirmed.[3]

Mr. Chief Justice WALLACE and Mr. Justice McKINSTRY dissented.

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[2] In holding that the doctrine of potential possession applies to a manufactured product, such as cheese, this decision, says Williston, "stands alone, * * * and must be regarded as questionable." Sales, § 134 note. Compare Langton v. Higgins, 28 L. J. Ex. 252 (1859), reported herein, post, p. 105.

[3] In Shaw v. Gilmore, 81 Me. 396, 17 Atl. 314 (1889), the court said: "The sale, however, can only operate upon a specific thing, as the grass of a particular field during a specified time that the grantor owned the right to cut and gather it in. * * * In the present case, the grant purports to be of the yearly crop of hay for an indefinite period of time. The controversy is over the fifth crop, sold by the assignor, who was in possession of the same, to a bona fide purchaser. Under the rules of the common law, the conveyance must be held inoperative as to the hay in dispute and, therefore, the plaintiff's title to the same fails."

In some states the statute prohibits mortgages made more than a specified time before the planting of the crop. See Williston, Sales, § 135.

## WELTER v. HILL.

(Supreme Court of Minnesota, 1896. 65 Minn. 273, 68 N. W. 26.)

CANTY, J.[4] During all the time hereinafter stated one Bodkin was the owner of a certain farm in Clay county, in this state, on which he carried on the business of farming. On March 15, 1894, the Economist Plow Company recovered judgment against him for the sum of $2,102.26 in the district court of that county, and on August 2d of the same year caused execution to be issued thereon and levied on about 100 acres of growing flax which was being raised by Bodkin on this farm. This action was brought by plaintiff, claiming to be the owner of the flax, against the sheriff, for the conversion of the same. Plaintiff had a verdict. Defendant's motion for a new trial was denied, and he appeals from the judgment thereafter entered.

It is assigned as error that the verdict is not sustained by the evidence, and, in our opinion, the assignment is well taken. Plaintiff claims to have purchased the field of flax from Bodkin in the spring, before the seed was sown, and to have received a bill of sale of the same. No bill of sale was produced on the trial, and there never was any apparent change of possession, but Bodkin sowed the flax, apparently as his own. However, no question seems to have been raised, and no issue tried, as to whether there was any actual fraud in the alleged sale, or any constructive fraud, except as it is claimed by appellant that the evidence is conclusive that the transaction, if there was any, was a chattel mortgage, and not an absolute sale; and that it is void as against creditors because never filed with the town clerk as required by Gen. St. 1894, §§ 4129, 4130. On this question we will not pass, as we are of the opinion that the next question disposes of the case.

Appellant contends that, conceding the contract to be in the nature of a sale, and not of a mortgage, still the evidence does not warrant a finding that it was anything more than an executory contract of sale under which the title to the property had not passed from Bodkin to plaintiff at the time of the levy. In our opinion, the point is well taken. * * *

Plaintiff does not claim that he rented the ground from Bodkin. He claims that he bought the crop. When did the title to the property pass? It did not pass when the bill of sale was made, because it was not then in existence. There was nothing then in existence but the seed, which was not yet sown. Plaintiff does not claim that he bought that, and, even if he had, it would not entitle him to follow that seed into the crop, and claim the whole crop. Calling the transaction a sale and the instrument a bill of sale did not make the contract an executed one, when the facts show that it was not. If the title did not pass when the bill of sale was made, when did it pass?

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[4] Part of the opinion is omitted.

We see nothing in the case which warrants a holding that it passed, or would pass, before the crop was threshed and ready for delivery. The levy was made prior to that. If the verdict in this case could be sustained, it would illustrate the beautiful uncertainty that in many cases would exist as to which of two parties is the owner of the personal property in question. There ought to be at least some general principles of law more definite and certain than the uncertain guess of the jury in each case. That guess ought to be confined to a much narrower range than it would be if this verdict could be sustained.

The judgment is reversed, and a new trial granted.

## HULL v. HULL.

(Supreme Court of Errors of Connecticut, 1880. 48 Conn. 250, 40 Am. Rep. 165.)

LOOMIS, J.[5] The controversy in this case has reference to the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The contract of sale provided that the plaintiff might take the mares to Murray's farm, in this state, of which she was and had been for several years the superintendent, and there keep them as breeding mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff.

No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm, on the 1st of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin.

The sole ground upon which the defendant claims to hold these colts is that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The court below overruled this claim, and in so doing we think committed no error.

The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist, nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If, however, it needs confirmation, the authorities in this state and elsewhere abundantly supply it. Lucas v. Birdsey, 41 Conn. 357;

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[5] The statement of facts is omitted.

Capron v. Porter, 43 Conn. 389; Spring v. Chipman, 6 Vt. 662. In Bellows v. Wells, 36 Vt. 599, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property in question when it first came into existence was in the plaintiff.

In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, partus sequitur ventrem, applies. We waive the consideration of these questions. It will suffice that, by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear.

It is true, as remarked in Perkins, Conv. tit. "Grant," § 65, that "it is a common learning in the law that a man cannot grant or charge that which he has not"; yet it is equally well settled that a future possibility arising out of, or dependent upon, some present right, property or interest, may be the subject of a valid present sale.

The distinction is illustrated in Hobart, 132, as follows: "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase, is void."

It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal. 1 Pars. Cont. (5th Ed.) p. 523, note k, and cases there cited; Hill. Sales, § 18; Story, Sales, § 186. In Fonville v. Casey, 5 N. C. 389, 4 Am. Dec. 559, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. And in McCarty v. Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262, it was held that where A. agrees with B. that the foal of A.'s mare shall belong to C., a good title vests in the latter when parturition from the mother takes place, though A. immediately after the colt was born sold and delivered it to D.

Before resting the discussion as to the plaintiff's title, we ought perhaps briefly to allude to a claim made by the defendant, both in the court below and in this court, to the effect that if the plaintiff's title be conceded she is estopped from asserting her claim. This doctrine of estoppel, as all triers must have observed, is often strangely misapplied. And it is surely so in this instance. The case fails to show any act or omission on the part of the plaintiff inconsistent with the claims she now makes, or that the creditors of Murray or the defendant as representing them were ever misled to their injury by any act or negligence on her part. On the contrary the estoppel is asserted in the face of the explicit finding, that "as soon as the plaintiff became aware of the attachment of her horses she forbade the officer taking the same, and demanded their immediate return to her."

The only fact which is suggested as furnishing the basis for the alleged estoppel is that from the 1st of August, 1879, to the 12th of January next following, "no attempt was made by the plaintiff to maintain her title by suit, although she was living during the time at Guilford, where said colts were." But who ever heard of an estoppel in an action at law predicated solely on neglect to bring a suit for the period of five months? To recognize such a thing for any period short of the statute of limitations would practically modify the statute and create a new limitation. Furthermore, in what respect have the defendant and those he represents been misled to their injury by this fact? The plaintiff never induced the taking or withholding of her property. And can a tort feasor or the wrongful possessor of another's property object to the delay in suing him for his wrong, and claim, as in this case, an estoppel on the ground that his wrongful possession proved a very expensive one to him, amounting even to more than the value of the property? He might have stopped the expense at any time by simply giving to the plaintiff what belonged to her.

The single question of evidence which the record presents we do not deem it necessary particularly to discuss. It will suffice to remark that if the defendant's testimony was admissible to show that Murray, after the sale to the plaintiff (and, so far as appears, in her absence), claimed to own the mares and colts, it was a complete and satisfactory reply for the plaintiff in rebuttal to show that Murray's own entries (presumably a part of the res gestæ) in the appropriate books kept by him, showed the fact to be otherwise, and in accordance with the plaintiff's claims.

At any rate it is very clear that no injustice was done by this ruling to furnish any ground for a new trial.

There was no error in the judgment complained of, and a new trial is not advised. In this opinion the other Judges concurred.

## BATES v. SMITH.

(Supreme Court of Michigan, 1890. 83 Mich, 347, 47 N. W. 249.)

Long, J. This is an action of trover to recover the value of one-half interest in a colt. The claim of the plaintiff is that he bred the mare of one James Fraser upon shares. The contract as stated by the plaintiff is that Fraser came to his farm, and said he wanted to breed his mare to the stallion American Boy, then kept by plaintiff, and that he had no money; that plaintiff then told him he would breed the mare on shares, and, if Mr. Fraser would come to him at any time within two weeks and give him $50 for the services of the horse, Fraser could have his (the plaintiff's) half-interest in the colt; that the mare was then and there bred under that arrangement, but no written contract was made. James Fraser was called as a witness for the defendant upon the trial, and testified: "My bargain with plaintiff that, if I did not pay plaintiff fifty dollars within three months, for the service of the stallion, he (plaintiff,) was to own a half-interest in the colt." On cross-examination he states the arrangement substantially as claimed by plaintiff, except that he was to have three months in which to pay the money. It appears that the mare was bred July 27, 1888, and that the defendant purchased her from Fraser on February 21, 1889, paying therefor the sum of $300.

Defendant upon the trial stated that at the time he purchased the mare he had no knowledge that the plaintiff made any claim to her progeny, and that plaintiff never made any claim until the colt was four or five months old. It appeared, however, that before defendant bought the mare he was informed that Fraser had bred to the stallion American Boy then kept by plaintiff, but was not advised that any contract was made by which the plaintiff was to have a half-interest in the colt. Demand was made before suit was brought, and the defendant refused to recognize the plaintiff's interest. Under these facts, the plaintiff's counsel requested the court to instruct the jury that Fraser could not sell the interest of plaintiff in the colt, and that the colt when foaled was the property in common of the plaintiff and defendant, and that the value of the one-half interest could be recovered in this action. This the court refused, and instructed the jury that if at the time the defendant purchased the mare from Fraser he had no knowledge of the arrangement made between plaintiff and Fraser, the title to the colt would pass to the defendant, but that if he did have knowledge of it, the title would not pass. The jury found a verdict in favor of defendant. Plaintiff brings error.

It is contended by plaintiff's counsel that the defendant was not in any sense a bona fide purchaser of the colt, but that, if he were, he could acquire from Fraser only his half-interest therein. It is a general rule that owners in common of property have a right to dispose of their own undivided shares, but such owner cannot sell the whole property, nor any portion thereof except his own; and, if he undertakes to dispose of any larger interest his co-owners are not bound thereby. Russell v. Allen, 13 N. Y. 173. The principle is well settled that a seller of personal property can convey no greater title than he has, and it makes no difference that the purchaser has no notice and is ignorant of the existence of the other parties in interest. Couse v. Tregent, 11 Mich. 65; Dunlap v. Gleason, 16 Mich. 158, 93 Am. Dec. 231; Tuttle v. Campbell, 74 Mich. 660, 42 N. W. 384, 16 Am. St. Rep. 652.

Did the contract, however, which plaintiff claims he made with Fraser convey to him one half-interest? The property upon which the contract was to operate had no potential existence. The mare at that time had not been bred, and it was uncertain that, when bred, she would be put in foal. There was nothing in existence which could be the subject of sale. It is essential to the validity of every executed contract of sale that there should be a thing or subject-matter to be contracted for. And if it appears that the subject-matter of the contract was not, and could not have been, in existence at the time of such contract, the contract itself is of no effect, and may be disregarded by either party. Strickland v. Turner, 7 Exch. 208; Hastie v. Couturier, 9 Exch. 102, 5 H. L. Cas. 673; Franklin v. Long, 7 Gill & J. (Md.) 407. A mere possibility or contingency, not founded upon a right, or coupled with an interest, cannot be the subject of a present sale, though it may be of an executory agreement to sell. Purcell v. Mather, 35 Ala. 570, 76 Am. Dec. 307; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357. Though the subject-matter of the agreement has neither an actual nor potential existence, such an agreement is usually denominated an executory contract, and for its violation the remedy of the party injured is by an action to recover the damages. Hutchinson v. Ford, 9 Bush (Ky.) 318, 15 Am. Rep. 711; Pierce v. Emery, 32 N. H. 484.

Again, it may be said that, where one of two innocent parties must suffer by the fraud of another, he shall bear the loss who by his conduct has enabled such third party to perpetrate the fraud. If the contract was made as claimed by the plaintiff, and there does not seem to be much controversy on this point, yet, the plaintiff had it in his power to protect himself, under the provisions of Act No. 280, Pub. Acts, 1887. This act provides that the owner or keeper of a stallion shall, after demand upon the owner of the mare for the price agreed upon for service, have a lien upon the get of such stallion for the period of six months after the birth of the foal, for the payment of the services of such stallion. In order, however, to perfect such lien, he must file with the township clerk in the town where such dam is owned the agreement or a true copy of such agreement entered into by the owner of the dam for such services, together with the description of such dam as to age, color, or other marks as the person filing such agreement is able to give. This filing is to operate, under the provisions of this act, as a chattel mortgage, and may be enforced in the same way. No such steps were taken. The mare remained in the possession of the owner, Mr. Fraser, from the time she was bred until in February following, when the defendant purchased her without any notice, so far as this record discloses, of the agreement made between plaintiff and Fraser.

It is shown that defendant was advised at the time he purchased that the mare had been bred to American Boy, but no notice was given him that plaintiff had any claim on the foal, and there was nothing upon the record in the town-clerk's office to give him any notice that plaintiff claimed a lien upon or had any interest in the foal. It cannot be said that the mere fact of notice of the breeding of the mare to American Boy was sufficient to put him upon inquiry as to any rights the owner of the stallion might have. The defendant must be regarded as a bona fide purchaser and owner of the mare; and, the title and ownership of the foal following the dam, he was the rightful owner of the foal.

We see no error in the case, and the judgment must be affirmed, with costs. The other justices concurred.

## LOW et al. v. PEW et al.

(Supreme Judicial Court of Massachusetts, 1871. 108 Mass. 347, 11 Am. Rep. 357.)

Replevin by the firm of Alfred Low & Co. of a lot of flitched halibut from the assignees in bankruptcy of the firm of John Low & Son, all of Gloucester. Writ dated August 24, 1869. The parties stated the following case for the judgment of the court:

On April 17, 1869, as the schooner Florence Reed, owned by John Low & Son, was about to sail from Gloucester on a fishing voyage, that firm received $1,500 from the plaintiffs, and signed and gave the plaintiffs the following writing:

"We, John Low & Son, hereby sell, assign, and set over unto Alfred Low & Company all the halibut that may be caught by the master and crew of the schooner Florence Reed on the voyage upon which she is about to proceed from the port of Gloucester to the Grand Banks, at the rate of five cents and a quarter per pound for flitched halibut, to be delivered to said Alfred Low & Company as soon as said schooner arrives at said port of Gloucester, at their wharf. And we, the said John Low & Son, hereby acknowledge the receipt of $1,500 in part payment for the halibut that may be caught by the master and crew of said schooner on said voyage."

In July, 1869, proceedings in bankruptcy were begun against John Low & Son in the district court of the United States for this district, in which they were adjudged bankrupts on August 6th, and on August 20th these defendants were appointed the assignees in bankruptcy, and the deed of assignment was executed to them. On Saturday, August 14th, the Florence Reed arrived at the port of Gloucester on her home voyage, and was hauled to the plaintiffs' wharf; and on the morning of Monday, August 16, the United States marshal took possession of the vessel and cargo under a warrant issued to him on August 6th in the proceedings in bankruptcy, and transferred his possession to the defendants upon their appointment.

The catch of the schooner consisted of about 40,000 pounds of halibut, and of some codfish. The plaintiffs demanded the halibut of the defendants, and offered at the same time to pay the price of it at the rate of five and a quarter cents per pound, less the $1,500 already paid. The defendants refused the demand; and the plaintiffs then replevied such a quantity of the halibut as represented the amount of $1,500 at that rate per pound, and offered to receive the rest of the halibut and pay for it at the same rate, but the defendants refused to acknowledge any right whatever of the plaintiffs in or to the fish.

If on these facts the plaintiffs were entitled to recover, they were to have judgment for nominal damages; but, if otherwise, the defendants were to have judgment for a return, with damages equal to interest at the annual rate of six per cent. on the appraised value of the fish replevied.

Morton, J. By the decree adjudging John Low & Son bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees. Williams v. Merritt, 103 Mass. 184, 4 Am. Rep. 521. The firm could not, by a subsequent sale and delivery, transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is whether a sale of halibut afterwards to be caught is valid, so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. Jones v. Richardson, 10 Metc. 481. The same principle is applicable to all sales of personal property. Rice v. Stone, 1 Allen, 566, and cases cited; Head v. Goodwin, 37 Me. 181.

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest. 2 Kent, Comm. (10th Ed.) 468 (641) note a; Jones v. Richardson, 10 Metc. 481; Bellows v. Wells, 36 Vt. 599; Van Hoozer v. Cory, 34 Barb. (N. Y.) 9; Grantham v. Hawley, Hob. 132.

The same principles have been applied by this court to the assignment of future wages or earnings. In Mulhall v. Quinn, 1 Gray, 105, 61 Am. Dec. 414, an assignment of future wages, there being no contract of service, was held invalid. In Hartley v. Tapley, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent, and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of or interest in the fish, and that the sale to the plaintiffs was void.

The plaintiffs rely upon Gardner v. Hoeg, 18 Pick. 168, and Tripp v. Brownell, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt which, under the shipping articles, would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered.

Judgment for the defendants.[6]

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[6] As to the equitable rights of a purchaser or mortgagee of future goods, see Williston, Sales, §§ 138-145; also an article by the same author, "Transfer of After-Acquired Personal Property," 19 Harv. Law Rev. 557.

# CHAPTER II

# TRANSFER OF PROPERTY AND TITLE

## SECTION 1.—UNCONDITIONAL CONTRACT TO SELL SPECIFIC GOODS—IN GENERAL

### WILLISTON ON SALES.

§ 260. * * * It may be assumed safely that when the law was first much developed in England, the rule of the Roman law requiring delivery in order to effect a transfer of the property was accepted.[1] But it was not long before payment of the price was also regarded as sufficient to effect the transfer of the property. Professor Ames has traced this development:[2]

"Detinue would also lie against a seller upon a bargain and sale. Here it was the payment of the purchase money that as a rule constituted the quid pro quo for the seller's duty to suffer the buyer to take possession of the chattel sold. If the bargain was for the reciprocal exchange of chattels, the delivery of the chattel by the one party would be as effective a quid pro quo as payment of purchase money to support an action of detinue against the other party. It was hardly an extension of principle to treat the delivery of the buyer's sealed obligation for the amount of the purchase money as equivalent to actual payment of money, or delivery of a chattel, and accordingly we find in Y. B. 21 Edw. III, 12–2, the following statement by Thorpe, Chief Justice of Common Bench in 30 Edw. III: 'If I make you an obligation for £40. for certain merchandise bought of you, and you will not deliver the merchandise, I cannot justify the detainer of the money; but you shall recover by a writ of debt against me, and I shall be put to my action against you for the thing bought by a writ of detinue of chattels.'

"But it was a radical departure from established traditions to permit a buyer to sue in detinue when there was merely a parol bargain of sale without the delivery of a physical res of any sort to the seller. But this striking change had been accomplished by the time of Henry VI. The new doctrine may be even older, but there seems to be no earlier expression of it in the books than the following statement by Fortescue, C. J.: 'If I buy a horse of you, the property is straightway in me, and for this you shall have a writ of debt for the money, and I shall have detinue for the horse on this bargain.' [3] From the mutuality of the obligations growing out of the parol bargain, without more, one might be tempted to believe that the English law had developed the consensual contract more than a century before the earliest reported cases of assumpsit upon mutual promises.[4] But this would be a misconception. The right of the buyer to maintain detinue, and the corresponding right of the seller to sue in debt, were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants—each party's grant of a right forming the quid pro quo for the corresponding duty of the other."

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[1] See an article by Prof. Richard Brown, 15 Juridical Review, 391, 395. This rule has persisted in regard to gifts for the validity of which delivery is still essential. Cochrane v. Moore, 25 Q. B. D. 57.

[2] 8 Harv. Law Rev. 252, 258.

The law of so remote a period, however, need not affect a discussion of existing law. It is clear that before the seventeenth century it was possible for the seller to transfer the property, not only without delivery, but without payment of the price or earnest money. This could probably only be done, however, if credit was expressly given by the seller.[5]

## TARLING v. BAXTER.

(Court of King's Bench, 1827. 6 Barn. & C. 360.)

Assumpsit to recover back £145 paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered and bargained and sold. At the trial before Abbott, C. J., at the London sittings after Hilary term, 1826, a verdict was found for the plaintiff for £145, subject to the opinion of this court on the following case.

On the 4th of January, 1825, the plaintiff bought of the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note signed by the defendant, and delivered to the plaintiff, was in these words: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of one hundred and forty-five pounds, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next." And the following note was signed by the plaintiff, and delivered to the defendant. "I have this day agreed to buy of Mr. John Baxter, a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4th, 1825."

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[3] Y. B. 20 Hen. VI, 35–4; Y. B. 21 Hen. VI, 55–12. See, to the same effect, 37 Hen. VI, 8–18, per Prisot, C. J.; Y. B. 49 Hen. VI, 18–23, per Choke, J., and Brian, J.; Y. B. 17 Edw. VI. 1–2. See, also, Blackburn, Contract of Sale, 190-196.

[4] Pecke v. Redman, Dy. 113 (1555), appears to be the earliest case of mutual promises.

[5] See Noy's Maxims, c. XLII (1641). See, further, infra, § 341.

At the meeting at which the notes were signed, but after the signature thereof, the defendant said to the plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, S. Baxter, on the 8th of the same month of January, took a bill of exchange for £145 to the plaintiff, drawn upon him by the defendant, dated the 4th of January 1825, payable one month after date, which the plaintiff accepted. The defendant afterwards indorsed it to George Baxter, and the plaintiff paid it to one Taylor, the holder, when it became due. The stack of hay remained on the same field entire until the 20th of January, 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire, the plaintiff applied to the defendant to know what he meant to do when the bill became due; the defendant said, "I have paid it away, and you must take it up to be sure: I have nothing to do with it, why did you not remove the hay?" The plaintiff said, "he could not, because there was a memorandum 'that it should not be removed until the bill was paid;' would you have suffered it to be removed?" and the defendant said, "certainly not." The defendant's set-off was for the price of the hay agreed to be sold as aforesaid. The question for the opinion of the court was, whether the plaintiff under the circumstances was entitled to recover the sum of £145 or any part thereof.

BAYLEY, J. It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is, in whom the property in this hay was vested at that time? By the note of the contract delivered to the plaintiff, the defendant agreed to sell the plaintiff a stack of hay standing in Canonbury Field at the sum of £145, the same to be paid for on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next. Now this was a contract for an immediate, not a prospective sale. Then the question is, in whom did the property vest by virtue of this contract? The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in these goods may be in the vendee.

The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price. The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale, and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a nonsuit, must therefore be made absolute.

Rule absolute.[6]

## SECTION 2.—CONTRACT TO SELL SPECIFIC GOODS TO WHICH SOMETHING REMAINS TO BE DONE

### RUGG v. MINETT.

(Court of King's Bench, 1809. 11 East, 210.)

In an action for money had and received by the defendants to the use of the plaintiffs, a verdict was found for the plaintiffs for £1415, subject to the opinion of the Court upon the following case.

On the 28th of April, 1808, the defendants, as prize agents to the commissioners for the care and disposal of Danish property, put up to public sale by auction, at Dover, the cargo of a Danish ship in lots, and the lots No. 28 to 54 inclusive consisted of turpentine in casks. The quantity contained in each lot being marked on the catalogue thus—10 cwt. 3 qrs. 26 lbs., the mode of bidding was this: Each lot (except the two last, which were sold at uncertain quantities) was to be taken at the weight at which it was marked, and the bidding was to be at so much per hundred weight on that quantity. The plaintiffs employed one Acres, the warehouseman of the defendants, to bid for them, and all the lots of turpentine, (with the exception of 3 lots, which were sold to other bidders,) were knocked down to Acres so acting for the plaintiffs. No conditions of sale were distributed prior to the sale; but the auctioneer, before the bidding commenced, read aloud the followings conditions: 1st, the highest bidder to be the buyer; but if any dispute should arise, the lot to be put up again. 2d, £25 per cent. is to be paid to the auctioneer as a deposit immediately after the sale, and the remainder in 30 days. The remainder of the purchase-money is to be paid on the goods being delivered. Should the goods remain after the limited time, the warehouse rent from that time to be paid at the rate of 2s. per ton per month, by the purchaser. 3d, the goods to be taken at the neat weight printed in the catalogue. 4th, the goods to be taken away in 12 months, or resold to pay the warehouse rent. Upon failure of complying with these conditions, the deposit-money is to be forfeited, and the commissioners to be at liberty to resell any lots belonging to defaulters, by whom all charges attending the same shall be made good. 1s. per lot under £10, 1s. 6d. from £10 to £25, and 2s. above £25 lot-money to be paid by the buyer to the auctioneer. Tare allowed for turpentine 1s. 5d.

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[6] Concurring opinions were delivered by Holroyd and Littledale, JJ.

Upon the turpentine being put up to sale, the auctioneer, by the direction of one of the defendants present, announced to the bidders that the casks of turpentine were to be filled up before they were delivered to the purchasers; and that in order to effect this, the two last lots would be sold at uncertain quantities, and the preceding lots would be filled from them. The whole of the turpentine, with the exception of the 3 lots before mentioned, were sold to the plaintiffs; and they also were the purchasers of the two last lots, from which all the lots without exception were to be filled up: and those two last lots were accordingly marked by the auctioneer in his catalogue with the words "more or less." Immediately after the sale £200 was paid by the plaintiffs to the auctioneer, as their deposit; and on the 9th of May, 1808, the plaintiffs paid to the defendants £1715 upon account of the turpentine, and the duties payable thereon. The turpentine remained in the warehouses of the defendants as before the sale, but was entered at the custom-house at Dover, in the name of the plaintiffs, on the morning of the 10th of May, 1808, before the fire, by Acres who paid on behalf of the plaintiffs £450 as a deposit for the duties.

On the same morning, the cooper, who had been employed by the defendants to make up all the casks previous to the sale of the 28th of April, was sent for by Acres, who was warehouseman to the defendants, and who acted as agent for the plaintiffs, to fill up the casks of turpentine, and he had filled all of them except 8 or 10; leaving them with the bungs out to enable the custom-house officer, who was expected every minute, to take his gauge in order to ascertain the duties. The two last lots, which were sold at uncertain quantities, and marked "more or less," contained more turpentine than was sufficient to fill up all those bought by the plaintiffs, and also those bought by the buyers of the three lots. In filling the casks sold to the plaintiffs one of the two last lots was used, and instead of the other of the two last lots, a preceding cask in point of number, which had been found to be an ullage cask, was substituted by the cooper, and from one of the two last lots the lots sold to the other buyers had been previously filled up. All the lots sold to the other buyers had been taken away before the cooper came on the 10th; and while the cooper was employed in filling up the plaintiffs' lots, and placing them ready, with the bungs of the casks out for the custom-house officer to gauge, but before he had filled up all the casks, or bunged any of them, a fire took place in the defendants' warehouse, which consumed the whole of the turpentine knocked down to the plaintiffs; the casks not having been weighed again by the plaintiffs, or gauged by the custom-house officer. While the money paid by the plaintiffs to the defendants on account of the turpentine remained in their hands, they received notice from the plaintiffs not to pay it over; and the present verdict is composed of that sum, deducting the £450 paid on account of the duty, which has been restored to the plaintiffs by the commissioners of customs.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover back the money so paid to the defendants? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

Lord Ellenborough, C. J. The Court have already intimated their opinion, as to those casks in the first lots which were filled up, and on which nothing remained to be done on the part of the sellers, but only the casks were left to remain for 30 days at the option of the purchasers in the warehouse at the charge of the sellers: the payment of the warehouse rent, however, is not material in this case; and when the casks were filled up, every thing was done which remained to be done by the sellers. It was necessary, however, that they should be gauged before they were removed, and the bungs were left out for the purpose of the gauger's doing his office, which it was the buyer's business to have performed; and therefore, according to the case of Hanson v. Meyer, and the other cases, every thing having been done by the sellers, which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and therefore they are not bound to pay for them.[7]

Upon this, it was agreed that the proportion to be allowed to the plaintiffs on the ten casks should be settled out of court; and that the verdict should be entered accordingly.

## PAINE & GEKLER v. YOUNG.

(Court of Appeals of Maryland, 1881. 56 Md. 314.)

Robinson, J. James Young, Jr., conveyed to the appellee the stock of carriages and wagons, finished and unfinished, and also the materials then being in his carriage factory.

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[7] Concurring opinions were delivered by Le Blanc and Bayley, JJ.

The property was left in the possession of Young, the bargainor, and the unfinished carriages were subsequently finished by him. Whether all the materials used in completing the carriages were the materials included in the bill of sale, or were in part bought by Young, the bargainor, after the date of the bill of sale, the evidence in the record is somewhat conflicting. But this question in the view we take of the case is quite immaterial.

Afterwards the appellants recovered a judgment against the bargainor, and sold under execution the carriages mentioned in the bill of sale. This suit is brought by the appellee, to recover damages for the unlawful seizure and sale of the carriages by the appellants. And it is insisted on the part of the defence, that if the carriages were finished in part with the materials included in the bill of sale, and in part with materials furnished by the bargainor in the bill of sale, with the acquiescence of the appellee, and that there was such a commingling of property as to make it impossible to identify or separate the materials used, that under such circumstances the plaintiff was not entitled to recover. And the decision in Hamilton v. Rogers, 8 Md. 321, is relied on in support of this contention. But that case differs widely from the one now before us. There Rogers mortgaged not only his stock and materials then on hand, but also all the stock and materials which he might subsequently purchase in the prosecution of his business. And the Court held:

1st. That the mortgagee could not maintain an action at law against a judgment creditor of Rogers for selling under execution, goods purchased by Rogers after the date of the mortgage, upon the ground that one cannot sell that which has not either actual or potential existence at the time of the sale.

2nd. That the burden of proof was upon the mortgagee, to show that the goods sold under the execution, were on the premises at the date of the mortgage.

3rd. Where property mortgaged is commingled with that subsequently acquired by the mortgagor, it is presumed to be done with the mortgagee's permission, and if it be so intermixed as to prevent separation or identification, the rights of third parties are not to be affected thereby.

But here the sale was of a subject-matter existing in specie, and in the possession of the bargainor. The contract of sale was an executed contract, and the title to the carriages, whether finished or unfinished, passed to the appellee upon the execution and delivery of the bill of sale. The mere fact that parts of the materials used in finishing the carriages were furnished by the bargainor, would not in itself operate to defeat the title of the appellee as purchaser under the bill of sale. How far he might be liable to the bargainor, if such materials were furnished with his acquiescence is another question. Be that as it may, it did not justify the appellants in selling the carriages under an execution against Young, the bargainor. There was no error therefore in refusing the several prayers offered by the appellants.

By the prayer offered by the appellee and granted by the Court, his right to recover was based upon the finding by the jury, that all the materials used in finishing the carriages were furnished by the appellee. This he was not obliged to prove. The appellants, however, have no right to object to an instruction which was prejudicial to the appellee and not to themselves.

For these reasons the judgment will be affirmed.

Judgment affirmed.[8]

## HANSON v. MEYER.

(Court of King's Bench, 1805. 6 East, 614.)

This was an action of trover, brought to recover the value of 33 cwt. 1 qr. 21 lb. of starch, which was tried before Lord Ellenborough, C. J., at the sittings at Guildhall after Trinity term, 1803, when there was a verdict for the defendant: and a motion being made for a new trial, which was argued in last Michaelmas term, the Court by consent, in Hilary term last, ordered a case to be made of the facts that were proved at the trial, which are as follows:

The plaintiffs are assignees of J. Wallace and W. Hawes under a commission of bankrupt issued against them. The defendant is a merchant in London. In January, 1801, the bankrupts employed Wright their broker to purchase of the defendant a quantity of starch, about four tons, belonging to the defendant, and which was then lying in the Bull Porters' warehouse in Seething-Lane: and Wright accordingly purchased the starch of the defendant at £6 per cwt., and sent to the bankrupts, his principals, the following note: "Dear Sirs, I have bought that small parcel of starch which you saw of Mr. James Meyer for your account, £6 per cwt. by bill at 2 months: 14 days for delivery from the 14th instant. Jan. 15th, 1801. Yours, &c. T. Wright." The starch lay at the Bull Porters'. The broker purchased for the bankrupts all Meyer's starch that lay there, more or less whatever it was, at £6 per hundred weight: it was in papers: the weight was to be afterwards ascertained at the price aforesaid. The mode of delivery is as follows: the seller gives the buyer a note addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer. This note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the vendee. The following note was given by the defendant: "To the Bull Porters, Seething-Lane. Please to weigh and deliver to Messrs. Wallace and Hawes all my starch. Jan. 17th, 1801. Per James Meyer, William Elliott." This order was lodged by the bankrupts at the Bull Porters' warehouse on the 21st of January, 1801, on which day the bankrupts required the Bull Porters to weigh and deliver to them 540 papers of the starch, which weighed

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[8] See, also, Young v. Matthews, L. R. 2 C. P. 127 (1866); Butterworth v. McKinly, 11 Humph. (Tenn.) 206 (1850).

|  |  | Cwt. | qr. | lb. |
|---|---|---|---|---|
|  |  | 21 | 1 | 6 |
| And on the 31st Jan. | 250 | 9 | 1 | 20 |
| And on the 2d Feb. | 400 | 15 | 1 | 4 |
|  | 1190 | 46 | 0 | 12 |

At which respective times the Bull Porters, in consequence of their order, weighed and delivered the same to the bankrupts, who immediately removed the same: the residue thereof, being 33 cwt. 1 qr. 21 lb. remained at the Bull Porters' warehouse till the failure of Wallace and Hawes. The above quantities of starch continued at the Bull Porters' warehouse in the name and at the expence of the defendant till they were weighed and delivered: and the residue also afterwards continued there in like manner unweighed, in his name, and charged to his expence. On the 8th of Feb., 1801, Wallace and Hawes became bankrupts. It was admitted that the defendant, after the bankruptcy, took away the remainder of the starch that had not been so weighed. The question for the opinion of the Court was, whether the defendant were entitled to the above verdict? If the Court should be of opinion that he was, then the verdict was to stand: if not, then a new trial was to be granted upon such terms as the Court should direct.

Lord Ellenborough, C. J., now delivered judgment.

By the terms of the bargain formed by the broker of the bankrupts on their behalf, two things, in the nature of conditions or preliminary acts on their part, necessarily preceded the absolute vesting in them of the property contracted for; the first of them is one which does so according to the generally received rule of law in contracts of sale, viz. the payment of the agreed price or consideration for the sale. The second, which is the act of weighing, does so in consequence of the particular terms of this contract, by which the price is made to depend upon the weight. The weight, therefore, must be ascertained in order that the price may be known and paid: and unless the weighing precede the delivery it can never, for these purposes, effectually take place at all. In this case a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered: and of course no such bill of two months for the price so depending on the weight could yet be given. The question is, What is the legal effect of such part-delivery of the starch on the right of property in the undelivered residue thereof?

On the part of the plaintiffs it is contended, that a delivery of part of an entire quantity of goods contracted for is a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole;

although the price for the same should not have been paid. This proposition was denied on the part of the defendant: and many authorities have been cited on both sides. But without deciding at present what might be the legal effect of such part-delivery in a case where the payment of price was the only act necessary to be performed in order to vest the property; in this case another act, it will be remembered, was necessary to precede both payment of price and delivery of the goods bargained for, viz. weighing. This preliminary act of weighing it certainly never was in the contemplation of the sellers to waive in respect of any part of the commodity contracted for. The order stated in the case from the defendant to the Bull Porters, his agents, is to weigh and deliver all his starch. Till it was weighed, they as his agents were not authorized to deliver it: still less were the buyers themselves, or the present plaintiffs, their assignees, authorized to take it by their own act from the Bull Porters' warehouse: and if they could not so take it, neither can they maintain this action of trover founded on such a supposed right to take, or, in other words, founded on such a supposed right of property in the subject-matter of this action. If any thing remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and of course this action, which is accommodated to and depends upon such supposed perfect right of property, is not maintainable.

The action failing, therefore, on this ground, it is unnecessary to consider what would have been the effect of non-payment of price on the right to the undelivered residue of the starch, if the case had stood merely on that ground, as it did in the case of Hammond and Others against Anderson, 1 New Rep. 69; where the bacon sold in that case was sold for a certain fixed price, and where the weighing, mentioned in that case, was merely for the buyer's own satisfaction, and formed no ingredient in the contract between him and the seller; though it formed a very important circumstance in the case, being an unequivocal act of possession and ownership as to the whole quantity sold on the part of the buyer; in like manner as the taking 800 bushels of wheat out of the whole quantity sold, and then on board the ship, was holden to be in the case of Slubey v. Heywood, 2 H. Bl. 504.

Without, therefore, touching the question which has been the main subject of argument in this case, and upon which my opinion at nisi prius principally turned, and without in any degree questioning the authority of the above mentioned two cases from the Common Pleas, this verdict may be sustained, on the ground that the weighing, which was indispensably necessary to precede the delivery of the goods, inasmuch as it was necessary to ascertain the price to be paid for them, had not been performed at the time when the action was brought.

The verdict, therefore, must stand, and judgment be entered for the defendant.

## TURLEY v. BATES.

(Court of Exchequer, 1863. 2 Hurl. & C. 200.)

The declaration contained a special count, alleging that the plaintiff bargained and sold, and the defendant bought from the plaintiff, a quantity of fire-clay then deposited on certain land of the plaintiff, at the price of two shillings per ton, upon the terms that the defendant should take away the goods and pay for the same within a reasonable time. It then, after averring that all conditions had been fulfilled to entitle the plaintiff to have the goods taken away and accepted by the defendant, and that the defendant took away and accepted a part of the goods under the contract, alleged as a breach that the defendant would not take away and accept the residue of the said goods, or pay for the same, whereby the plaintiff lost the price and profit he would have made.

The declaration also contained counts for goods bargained and sold, goods sold and delivered, and on an account stated.

The defendant, as to the first count, pleaded a denial of the buying and selling, and of the plaintiff's readiness to deliver and suffer the defendant to take away the residue. To the rest of the declaration he pleaded, never indebted, and a set-off.

The cause was tried, before Channell, B., at the Middlesex Sittings after last Easter Term, when the following facts appeared (as stated in the judgment, post, p. 207). The plaintiff was an Iron and Coal Master at Coseley in Staffordshire. In the year 1854, and between that and the year 1857, he excavàted and raised from his colliery, the Coseley Moore Colliery, a quantity of fire-clay. This clay was stacked in a heap on land of the plaintiff near to the bank of his colliery. Before December, 1860, a portion of this heap had been sold and removed. In that month a quantity, estimated by the plaintiff at about 1500 tons, still remained stacked in the heap. The defendant had before this time bought of the plaintiff, and carted and carried away, portions of the heap. On several occasions, in December, 1860, the plaintiff and defendant met, and a bargain was come to with respect to the clay. This bargain was on some points differently represented by the evidence for the plaintiff and by that of the defendant.

According to the case for the plaintiff the bargain concluded was for the sale and purchase of the entire heap as then stacked, at the price of two shillings per ton; the plaintiff being willing to take that price, instead of a higher one which he had demanded, provided the whole heap was taken away, so that the ground might be cleared: that the defendant was at his own expense to load and cart it away; and that the clay, when on its way to the defendant's premises, was to be weighed at a weighing machine belonging to one Johnson, which machine the defendant's carts would pass on their way; and that the defendant was to pay for the weighing.

It was not denied, on the part of the defendant, that a bargain was made to pay for such clay as he might take away at the rate of two shillings per ton, nor that such clay was to be carted and weighed at his own expense; but it was contended by the defendant that the bargain was not for the whole heap as it stood, but only for such portion of the clay as the defendant choose to send for and cart away, and after having it weighed at Johnson's machine, to pay for it at the rate aforesaid. No point was made, on the Statute of Frauds, that the contract was not in writing—whether the verbal bargain was for the whole or for only a portion of the stack was the principal question in the cause. It was, however, further contended by the defendant that whatever the quantity contracted to be bought, it was bought on a warranty by the plaintiff that the clay would stand a red heat.

After the bargain the defendant at different times, as he thought fit, carted away portions of the clay, in the whole about 270 tons. On the three or four first occasions of carting away, the clay was weighed at Johnson's machine. On one occasion, the last, and without any notice to the plaintiff, clay was loaded by the defendant's servants and carted away in an opposite direction to the weighing machine, and such clay was taken to a canal where it was loaded into a boat and taken by water carriage to Liverpool. The plaintiff, whilst the defendant's men were carting this last clay, saw them and followed them, and the clay was guaged on the barge in the plaintiff's presence at twenty-two tons.

Evidence was given, on the part of the defendant, that the clay which had been taken away by him had been used in his business, and did not answer the warranty alleged to have been given. On this ground also he denied his liability to take or pay for more than had been removed. This evidence became immaterial, as the learned Judge ruled there was no evidence of a warranty.

All the clay so taken away by the defendant had either been paid for before action brought or was covered by a set-off.

The learned Judge left to the jury the question what was the bargain; and they found, for the plaintiff, that the bargain was a bargain for the whole. It was then further objected by the defendant, that, assuming that the verbal bargain was for the sale of the whole of the stack of clay, and further that there was no defence on the ground of warranty, yet, as the clay sought to be recovered for had never been weighed at Johnson's machine, the count for goods bargained and sold could not be maintained; and that, in the absence of any evidence of any fall in the value of clay or other loss by reason of not taking it away, the plaintiff could at most, recover only nominal damages.

No evidence of any actual loss or damage was given and a verdict was then entered for the plaintiff, by consent, for the sum of £112 10s. 6d., as the estimated value of the clay not removed, at the contract price of two shillings per ton: leave being reserved to the defendant to limit the verdict to the first count, and to nominal damages on that count in case this Court should be of opinion that the plaintiff was only entitled to recover on that count.

Channell, B. This was an action tried before me at the Middlesex Sittings, in last Easter Term. (His Lordship then stated the pleadings, and proceeded.) At the trial a verdict was found for the plaintiff, damages £112 10s. 6d., with leave reserved to the defendant to move to reduce the verdict to nominal damages on the ground hereafter mentioned. (His Lordship then stated the facts as above set forth, p. 201.) This rule was argued before the Lord Chief Baron, my Brother Bramwell, and myself.

For the plaintiff it was contended, that where full authority was given to the buyer to remove the clay sold, and all that the seller had to do according to the contract was complete, and where everything that remained to be done was to be done by the buyer at his own expense, viz., as in this case, to cart away and have the clay weighed at his own expense, it must be taken as if there had been such a bargain and sale as to pass the property though the clay had not been removed and weighed, and that the contract price might be recoverable on the count for goods bargained and sold.

For the defendant it was contended, that taking the case on the plaintiff's evidence, and as found by the jury, that there had been a removal and weighing of part of the clay, yet no property passed in any clay until the clay had been weighed at Johnson's machine and the quantity and price thus ascertained, so as to entitle the plaintiff to recover on the count for goods bargained and sold.

In the course of the argument for the defendant we were referred to several cases decided in our Courts which were said to govern the question, and to a passage from my Brother Blackburn's Treatise on Contract of Sale, part 2, chap. 2, p. 152. It was argued that the rule deducible from these authorities was, that so long as a price had been agreed upon according to quantity, to be ascertained by weighing, that until the goods had been weighed and the price so ascertained the contract was incomplete; which rule it was said was in accordance with the rule given in Pothier, Contr. de Vente, with Kent's Commentaries, vol. 2, p. 405, § 309, New York Edition, 1849, the Code Civil, liv. iii., tit. vi., chap. 1, arts. 1585, 1586, 1587.

The rule as stated in Blackburn on Contract of Sale, p. 152, is, "That where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods where the price is to depend on the quantity or quality of the goods, the performance of these things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted."

After adverting to the rule as one wholly adopted from the civil law, the learned author (at page 153) says: "In general, the weighing, etc., must from the nature of things be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing when the price is to depend on the weight, there seems little reason why, in cases where the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered provided it be of value."

The learned author, however, considered the rule he mentions to prevail here, and to rest upon the authority of the English decided cases. Several case are then cited in the Treatise: Hanson v. Meyer, 6 East, 614; Hinde v. Whitehouse, 7 East, 558; Rugg v. Minett, 11 East, 210; Zagury v. Furnall, 2 Camp. 240; Simmons v. Swift, 5 B. & C. 857 (E. C. L. R. vol. 11); Laidler v. Burlison, 2 M. & W. 602; Tripp v. Armitage, 4 M. & W. 687. The author further observes, "That if it appear from the agreement that the intention of the parties is that the property shall pass presently, the property does pass though there remain acts to be done by the vendor before the goods are deliverable;" citing Wood v. Russell, 5 B. & A. 942 (E. C. L. R. vol. 27); Clarke v. Spence, 4 A. & E. 448 (E. C. L. R. vol. 31).

It is very doubtful whether in stating the rule to be that where anything remains to be done to the goods for ascertaining the price, as weighing, etc., the performance was a condition precedent to the transfer of the property, it was meant by the learned author to include a case where all that remained to be done was to be done by the buyer with full authority from the seller to do the act.

In Hanson v. Meyer the weighing was to precede the delivery, and was a condition precedent to the purchaser's right to take possession and to a complete present right of property. In Hinde v. Whitehouse, which was a case of a sale by auction, it was held that though the duties to the Crown remained to be paid by the seller before possession could be had by the buyer, the property passed from the time of sale; the words of the conditions showing that intention. In Rugge v. Minett a duty remained to be performed by the sellers; and Lord Ellenborough stated the test be "whether everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state;" and Mr. Justice Bayley, in effect, adopted the same test. Zagury v. Furnall is an authority to the same effect. There it was the duty of the seller to count the skins in each bale, and the price was for a certain sum per dozen skins. In Simmons v. Swift, the authority most in point for the defendant, it was a part of the contract there for the sale of a stack of bark at £9 per ton, that the bark should be weighed, and the concurrence of the seller in the act of weighing was necessary. Bayley, J., after stating the general principle, says: "If anything remains to be done on the part of the seller, until that is done the property is not changed."

From a consideration of these cases, it appears that the principle involved in the rule above quoted is, that something remains to be done by the seller. It is, therefore, very doubtful, as before stated, whether the present case comes within the principle of the rule. But, however that may be, it is clear that this rule does not apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once, and that their intention must be looked at in every case. This is clearly laid down in the case of Logan v. Le Mesurier, 11 Moo. P. C. C. 116, and in Hinde v. Whitehouse, 7 East, 558, cited supra, and in Blackburn on Contract of Sale, p. 151.

In the present case the jury have, in effect adopted the plaintiff's version of the bargain, by their finding that it was for the whole heap. And taking that view of the case, it seems to us clear that the intention of the parties was that the property in the whole heap should pass, notwithstanding the clay was to be weighed at Johnson's machine; and we, therefore, think that the rule to reduce the damages must be discharged.

Rule discharged.

## NICHOLSON v. TAYLOR.

(Supreme Court of Pennsylvania, 1858. 31 Pa. 128, 72 Am. Dec. 728.)

THOMPSON, J.[9] "When the lawful form of contracting is pursued," said Mr. Justice Lowrie in Winslow, Lanier & Co. v. Leonard, 24 Pa. 14, 62 Am. Dec. 354, "the vesting of the title always depends upon the intention of the parties, to be drawn from the contract and its circumstances," and "it is perfectly legitimate to point to the want of measuring and setting apart as evidence, in the very nature of the transaction, that it was not intended as a perfect sale:" Id. Going further in this direction than mere evidence, C. J. Gibson, in Hazard v. Hamlin, 5 Watts (Pa.), 201, declared that "where nothing is paid or delivered, it is agreed on all hands that the contract is merely executory."

This is true of such a contract standing alone; whether taken as an axiom or as evidence merely, the difference is in terms only. No intention is to be drawn from a contract but what it expresses, when there is nothing else to manifest it; so that the difference of terms in stating the proposition leaves the rule the same, namely, that so long as anything remains to be done as between the vendor and vendee, for the purpose of ascertaining the amount and price of the article, the property and risk remains in the vendor; it is not changed: Addison on Contracts, 222, 223; Hanson v. Meyer, 6 East, 614; Ward v. Shaw, 7 Wend. (N. Y.) 404; Lester, Sennett & Co. v. McDowell, 18 Pa. 92; Hutchinson v. Hunter, 7 Pa. 140; Smyth v. Craig, 3 Watts & S. (Pa.) 20; Winslow, Lanier & Co. v. Leonard, 24 Pa. 14, 62 Am. Dec. 354; Nesbit v. Burry, 25 Pa. 208. This rule is predicable of cases where no actual delivery of the property has taken place, and it is sought to give the contract the effect of changing the possession. If parties choose to deliver property without the price being fixed, the property will pass, because it is the contract and intention to pass it.

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[9] The statement of facts is omitted.

But we have to do with a case not of this last kind. The contract is as follows:

"Sold Messrs. R. L. & C. L. Nicholson, load of Pine creek lumber, within the neighborhood of 5000 feet of plank, at $15.50 and expenses, take a note at 6 months, with interest. T. B. Taylor & Co. 8th Mo. 11th."

A Pine creek load of lumber, it would appear contains about 50,000 feet board measure, a portion of which in this case was plank. The oral testimony left the case just as it found it, giving nothing in regard to the intention of the parties but what was contained in it. The defendants below refused to deliver the lumber, alleging that they were mistaken in the amount of the plank contained in it—that in place of 5000 there were 10,000 feet, and which they charged that plaintiffs knew; but they offered to deliver the load, or the amount of it, with 5000 feet of plank in it. The plaintiffs refused to take it. This being the situation of things between the parties, and the plaintiffs claiming that the property passed to them, brought a special action on the case against the defendants in which they had a count in trover. On the trial in the district court, the point was reserved as to whether the property passed by the contract; and a verdict was rendered in favor of plaintiffs for $1050.50, its entire value. Afterwards the court entered judgment for the defendants non obstante veredicto, on the point reserved.

The case stands now simply upon the rights of the parties as created by the written contract. Applying the rule already laid down, "that when something remains to be done between the vendor and vendee for the purpose of ascertaining the amount and price of the article, the property and risk remains in the vendor," to this case, we will have but little difficulty in coming to a conclusion. The lumber was to be measured before the price could be ascertained, so as to give the six months' note for the payment. This was in point of labor, as well as in other particulars, an important item of the transaction. No time was set for the measurement, or for giving the note, the latter being consequent only on the former; all showing that the contract was but executory in fact and intention. The property therefore remained in the vendor, and the plaintiffs had no legal right to recover its value in trover; property in the plaintiffs being necessary to enable them to do so. They were at no time debarred from suing for damages for a breach of the contract, if any such had occurred. We think the court below were right in their decision, and this judgment must be affirmed.

Judgment affirmed.[10]

## BOSWELL v. GREEN.

(Supreme Court of New Jersey, 1856. 25 N. J. Law, 390.)

Potts, J.[11] This was an action of replevin, brought by Edward M. Green against William Boswell, sheriff of the county of Mercer. Boswell, by virtue of executions in his hands, seized a lot of coal, lying at the coal yard of Fish & Co., as the property of Dewar, Mein & Kay, the defendants in execution. Green thereupon issued his writ of replevin, claiming to have purchased the coal from Dewar, Mein & Kay. The sheriff gave the usual bond; the coal was left in his possession, and subsequently sold for the benefit of the execution creditors. On the trial, the verdict was for Green, the plaintiff, and the jury assessed his damages at $2866.43 and costs. The several matters assigned as errors will be noticed in the order in which they were discussed on the argument. * * *

V. Another ground of error assigned is, that the court charged the jury, "that it was not necessary to pass the title to the coal, that the whole quantity should be ascertained; and that the title to the coal, if the jury believed the witnesses, did vest in the plaintiff before the aggregate price was known; and that the coal was not till then at the risk of the seller, but at the risk of the said Green, after the delivery by J. S. Fish & Co.;" whereas the judge ought to have charged, that it was necessary to pass the title, that the whole quantity of coal should be ascertained, and that the title did not vest in the plaintiff before the aggregate price was known, and that there was no delivery by Fish & Co.

The quantity of coal was not ascertained at the time of the making and delivery of the bill of sale of the 6th September.[12] It lay on the wharf of Fish & Co. All that Kay, in the name of the firm, did was to deliver the paper, at the time it was signed, to Green. Fish says: "On the morning of the 6th September, Green called on me with the order of that date. I told him I had no objection to giving the coal to him, subject to the claim of Fish & Co. for $108.18 for wharfage. I gave him possession, subject to our claim, by signing at the foot of the order this note: 'Possession delivered of the above mentioned coal in compliance of the above order, subject to a payment of $108.18 for unloading and wharfage on this coal. September 6, 1854. J. S. Fish & Co.' "

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[10] Perhaps the leading American case in support of the rule of Hanson v. Meyer is Lingham v. Eggleston, 27 Mich. 324 (1873).

[11] The statement of facts and part of the opinion are omitted.

[12] The bill of sale was as follows:

"This is to certify, that Edward M. Green has this day purchased of us all the coal, our property, now on the wharf of Jona S. Fish & Co. at $4.70 per ton for the egg and stove coal, and $4 for chestnut; and we hereby direct the said Jona S. Fish & Co. to deliver possession of said coal to said Green. Dewar, Mein & Kay.

"Dated Sept. 6, 1854."

The coal remained where it lay, and on the morning of the 7th was levied on by the defendant under the executions in his hands, and subsequently sold by him, to wit, 464 tons of egg coal, 133 tons of chestnut, and 25½ tons of stove coal. The sheriff paid Fish & Co. the $108.18 the morning after the sale.

These are substantially the facts proved. The question is, was the sale and delivery to Green complete, so as to vest the title in him on the 6th September? The defendant's counsel insists it was not, and the title did not vest, because the quantity of coal had not been ascertained.

There is abundant authority for the doctrine that the property does not pass absolutely unless the sale be completed; that it is not completed until the happening of any event expressly provided for, or so long as anything remains to be done to the thing sold to put it into a condition for sale, or to identify it, or discriminate it from other things, or to determine its quantity, if the price depends on this, unless this is to be done by the buyer alone. 1 Parsons on Cont. 441; Simmons v. Swift, 5 Barn. & Cress. 857; Alexander v. Gardner, 1 Bingham's N. C. 671, per Justice Park; Swanwick v. Sothern, 9 Adol. & Ellis, 895, per Lord Denman; Hanson v. Meyer, 6 East, 614; Rapelye v. Mackie, 6 Cow. (N. Y.) 250; Outwater v. Dodge, 7 Cow. (N. Y.) 85; Ward v. Shaw, 7 Wend. (N. Y.) 404; and see cases collected in Ross on Contracts, p. 1, etc.

But these are all cases upon the construction of contracts, where the intention of the parties was the real question in controversy. Where it is clear, by the terms of the contract, that the parties intended that the sale should be complete before the article sold is weighed or measured, the property will pass before this is done. Tarling v. Baxter, 6 Barn. & Cress. 360, per Bayley, J.; Logan v. Mesurier, 6 Moore's P. C. Cases, 131, per Lord Brougham; Riddle v. Varnum, 20 Pick. (Mass.) 280. It must be so. There is nothing illegal in such a contract; and where contracts are legal, made in good faith, and not contrary to public policy, courts are bound to give them effect according to the clearly expressed intention of the parties who make them.

In this case the bill of sale, the order for delivery, and the memorandum of delivery were in writing. The intention to sell and pass the title and possession at the time was clear upon the face of the papers, and was supported by the evidence. The legal inference, from the facts and documents before the court, undoubtedly was that the title passed, and so the court told the jury. There is no error in this.

* * *

The judgment should be affirmed.

The Chief Justice, and Elmer and Haines, Justices, concurred.[13]

## SANGER et al. v. WATERBURY et al.

(Court of Appeals of New York, 1889. 116 N. Y. 371, 22 N. E. 404.)

Appeal from judgment of the general term of the supreme court, in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of the defendants, entered upon a verdict directed by the court.

This was an action of replevin brought to recover the possession of 238 bags of coffee identified and described in the complaint as follows: "89 bags, marked No. 6, H. L. B. & Co., D. B. & Co.; 32 bags, marked No. 8, H. L. B. & Co., D. B. & Co.; 14 bags, marked No. 10, H. L. B. & Co., D. B. & Co.; 29 bags, marked No. 12, H. L. B. & Co., D. B. & Co.; 68 bags, marked No. 14, H. L. B. & Co., D. B. & Co.; 6 bags, marked No. 16, H. L. B. & Co., D. B. & Co."

The complaint alleged, and the answer admitted, "that on or about the 22d day of July, 1885, the said goods * * * were sold by the plaintiffs to the defendants John K. Huston and James E. Huston, * * * on the credit of sixty days for one-half thereof, and of ninety days for the balance thereof." It appeared that the plaintiffs, on the 6th day of July, 1885, purchased of Boulton, Bliss & Dallett 605 bags of coffee, then stored with E. B. Bartlett & Co. On the 22d day of July the plaintiffs sold the 238 bags of coffee hereinbefore referred to to J. K. Huston & Co., of Philadelphia. That firm, on the 24th day of July, upon the security of the coffee thus purchased, borrowed from the defendants Waterbury & Force $2,300, and then transferred the coffee to them. On July 27th following, said firm failed, making a general assignment. On the next day, the plaintiffs commenced this action, by means of which the coffee was taken from the possession of Waterbury & Force. The coffee then was, as it had been from the time of the purchase by the plaintiffs, actually deposited in the warehouse of E. B. Bartlett & Co., and had not as yet been weighed.

Parker, J. (after stating the facts as above). The appellants contend that the title to the coffee in controversy did not pass to J. K. Huston & Co., and that therefore the transfer to Waterbury & Force did not vest in them the title or the possession. The sale is admitted; but as the coffee had to be weighed, in order to ascertain the amount to be paid to plaintiffs, it is insisted that the title remained in the plaintiffs. In aid of this contention is invoked the rule that where something remains to be done by the seller to ascertain the identity, quantity, or quality of the article sold, or to put it in the condition which the contract requires, the title remains in the vendor until the condition be complied with.

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[13] See, also, Allen v. Elmore, 121 Iowa, 241, 96 N. W. 769 (1903).

The appellants cite a number of authorities which, they urge, so apply this rule as to make it applicable to the case here presented. It is said in Groat v. Gile, 51 N. Y. 431, that this "rule has reference to a sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of determining the total value thereof at certain specified rates, or a designated fixed price." This distinction is recognized and enforced in Crofoot v. Bennett, 2 N. Y. 258; Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Bradley v. Wheeler, 44 N. Y. 495. In Crofoot v. Bennett, supra, the court say: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass." This expression of the court is cited with approval in Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42, in which case, after a full discussion of the authorities, the court approved the rule as laid down in Groat v. Gile, supra.

Now applying that rule to the facts in this case, nothing remained to be done in order to identify the goods sold; because while, out of a larger lot, 238 bags of coffee were disposed of, nevertheless, as appears from the complaint and the testimony adduced, the bags were so marked that there was no difficulty about identifying the particular bags sold. There remained, therefore, nothing to be done except to weigh the coffee for the purpose of ascertaining the purchase price: for whether the 238 bags of coffee should prove to weigh more or less than the parties anticipated was not of any consequence. Whatever it should prove to be, for that number of pounds J. K. Huston & Co. had agreed to pay.

This case, therefore, does not come within the rule contended for by the appellant, but, instead, is governed by the principle enunciated in Groat v. Gile.

Having reached the conclusion that the title and the possession passed to J. K. Huston & Co., it becomes unnecessary to consider any of the other questions discussed, for the plaintiff is without title upon which to found the right to maintain an action.

The judgment appealed from should be affirmed. All concur.

Judgment affirmed.

## SECTION 3.—"SALE OR RETURN" AND "SALE ON APPROVAL"

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### ELPHICK v. BARNES.

(Common Pleas Division, 1880. 5 C. P. Div. 321.)

DENMAN, J.[14] The plaintiff in this case sued the defendant for £65., the price of a horse and a cow sold and delivered.

The defendant admitted that he agreed to purchase a horse and a cow, but alleged that they were not sold or purchased together at £65., but under two separate and distinct contracts. There was conflicting evidence as to this part of the defence; but, upon the argument before me (there having been no finding of the jury upon the point). it was agreed that I should decide the question; and I found for the defendant, that there were two separate and distinct contracts, the horse being to be sold for £40., and the cow for £25. The latter amount was paid into court; and no question remains for decision except that arising upon the defendant's answer to the plaintiff's demand so far as the price of the horse was concerned. This answer as set out in the statement of defense was as follows: "The price of the said horse was £40., and the plaintiff warranted it sound and well, and it was sold to the defendant on the terms that, if it did not answer the said warranty or suit the defendant, the defendant should be at liberty to reject the same. The said horse was neither sound nor well at the time of the sale to the defendant, but was suffering from internal inflammation, and in consequence of such unsoundness and illness, it died before a reasonable time in which to return the same had elapsed. The defendant, on discovery of the unsoundness, repudiated the contract, and gave notice thereof to the plaintiff."

The jury found that there was no warranty of soundness, and that the horse was in fact sound at the time when the bargain was made. But the defendant's counsel at the trial relied not only on a warranty, but upon evidence that the plaintiff, at the time of the bargain being made, had agreed that the defendant might take the horse away and work him, and, if he did not suit the defendant by working in every kind of vehicle for which the defendant required him, the defendant might return him within eight days, and that, if the horse was satisfactory, the defendant should pay for him at that time, viz. at the end of the eight days. The bargain having taken place on Thursday, the 31st of July, the horse died on Sunday, the 3d of August, in the defendant's stable, to which he had been removed on the 31st of July. Under these circumstances, the defendant's counsel contended that the defendant was not liable, because the bargain was a conditional one, and, the sale not having become absolute before the death of the horse, an action for goods sold and delivered would not lie.

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[14] The statement of facts is omitted.

It was objected, for the plaintiff, that no such case ought to be left to the jury, because it was not raised by the statement of defence. But I was of opinion that this defence was one included in the statement of defence; that the pleadings might properly be amended if necessary, but that it was not necessary to amend them; and that no injustice would be done by leaving the question to the jury. I therefore left it to the jury as follows: "Was the bargain on the 31st of July one for a sale out and out, or only for a sale conditional on the defendant finding the horse all right at the end of the eight days?" The jury found, in answer to that question, "that the bargain was conditional on the horse being right and with a trial for eight days." Being doubtful what the jury meant by "right," I asked them the question; to which they replied, "Suitable for the defendant's purposes, not contemplating the case of death." They afterwards added, in answer to a further question, "But for the complaint which came on after the bargain, we see no reason to suppose that the horse would not have been suitable for the defendant's purposes; by trial, we mean a trial as regards suitability, not as regards health." Taking all these findings together, I think they amount to a finding that the plaintiff sold the horse to the defendant upon a condition that the horse should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes.

The horse having died without fault of either party, the question is, whether the plaintiff can maintain his action for goods sold and delivered. I am of opinion that he cannot.

The case of Ellis v. Mortimer, 1 N. R. 257, shews that the defendant had the whole time allowed for the trial in which to decide whether he would return the horse or not. I think it clear that no action for goods sold and delivered would have lain at any time before the eight days had expired, in case the horse had lived. But before the eight days had expired the horse died. If the defendant were to be fixed with the price of the horse, he would be compelled to pay for something different from what he had bargained for, viz. a horse of which he should have had eight days' trial. The finding that the horse might or probably would have suited the defendant's purposes does not appear to me to be sufficient reason for fixing the defendant as the absolute owner of the horse. The option was his at the moment of the horse's death, and down to a later period if the horse had lived.

The case of Rugg v. Minett, 11 East, 210, which was relied upon for the plaintiff, does not appear to me to apply, because that was not a case in which the buyer of the goods which were destroyed had any option as to whether he should become the purchaser or not, but, at the time of the destruction of the goods, he had by virtue of the bargain and of what had passed become the absolute owner of the goods in respect of which he was held liable. Nor, in my opinion, does the dictum of Coleridge, J., in Moss v. Sweet, 16 Q. B. 495, which was relied upon for the plaintiff, help the plaintiff's contention in this case. That was a case in which, the defendant having taken delivery of goods "on sale or return," and having kept the goods, it was held that the sale was complete if the goods had not been returned within a reasonable time, and that the common count for goods sold and delivered would suffice. Coleridge, J., in that case says: "The goods in question passed on condition that, unless returned, that is, at the option of the buyer, within a reasonable time, they were to be taken as sold to him. That condition was at an end after the lapse of a reasonable time without a return of the goods; and the sale was then complete." He does not say that it was complete before that time. He does go on to say: "The same consequence would follow where goods are destroyed or injured, so that a return within the meaning of the contract becomes impossible." This was relied upon as referring to an accidental destruction, such as by death or fire. I think it clear that this was not the meaning, but that the learned judge referred to destruction of or injury to the goods being the act of the defendant, in which case of course the defendant would have been liable as much as if he had kept them an unreasonable time.

The case of Head v. Tattersall, Law Rep. 7 Ex. 7, is nearer to the present case. That was an action for money received, to recover back the price of a horse which had been sold at Tattersall's with a warranty and a condition that the plaintiff was to be at liberty to return the horse, if it did not answer the description, up to the following Wednesday. The horse was injured on its way home, and depreciated in value, but without any fault of the plaintiff's servant, who was taking it home. The horse, being found not to correspond with the warranty, was returned within the time; and it was held that the plaintiff had a right to return it and recover back the price, notwithstanding that he was unable to return it in the same condition. It was attempted to distinguish that case from the present, on the ground that there was a right to return the horse on a specific ground, on which it was in fact returned. But I can see no difference in principle between such a case and the case in which the purchaser has an option to return the horse on any ground still remaining to him at the time at which the event occurs which renders it impossible for him to exercise that option, and so to have the whole benefit of his bargain. In such a case, I think the sale to him cannot be considered to be absolute at the time of the accident occurring. The maxim of "ne perit domino" applies, I think, in such a case much more reasonably as against the unpaid contingent vendor than as against the possible vendee still having an option to return at the end of a period not yet expired. I think the law relating to such a case is accurately stated by Mr. Benjamin in p. 483 of the 2nd edition of his work on Sales, where he lays it down as follows, speaking of "sales on trial," or "sales on approval," in which cases, he says, "There is no sale until the approval is given either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial." Here, I think, there was no sale at the time of the horse's death, which happened without the fault of either party, and therefore that the action for goods sold and delivered must fail; and I give judgment for the defendant, except so far as relates to the costs of and occasioned by the allegations of warranty and unsoundness, which costs I order to be paid by the defendant,—such costs to be set off against the defendant's costs, on taxation.

Judgment for the defendant.

## FOLEY v. FELRATH.

(Supreme Court of Alabama, 1892. 98 Ala. 176, 13 South. 485, 39 Am. St. Rep. 39.)

HARALSON, J. Foley sued Felrath for $502.56 for merchandise, goods, and chattels sold by him to said Felrath on the 1st of August, 1892, and on open account and on account stated for like amounts.

It was claimed by the plaintiff, and he so testified, that he was a manufacturer of gold pens in New York city; that on the 8th March, 1892, he was in Mobile, Ala., and while there was in the store of defendant, and sold to him a bill of goods in his line for $502.56; that the goods were accordingly shipped to the defendant by plaintiff by the Adams Express Company, for which said company gave him a receipt; that at the time of the sale its terms and details were written down by plaintiff, one-half to be secured by defendant's note at four months, and one-half at six months; the last note, if all the goods were not sold in that time, might be paid in goods not sold, at defendant's option; that the sale was absolute, and not conditional; that defendant, after he received the goods, notified him that he had returned them by the express company, and afterwards the company brought the box of goods to plaintiff, and he would not receive them, because they were defendant's.

The defendant contradicted this evidence of the plaintiff, and testified that plaintiff came into his store, and, representing himself as a large manufacturer of gold pens and novelties in that line, asked him to take the agency for him for the sale of his goods in Mobile, and, as the result of their interview, defendant agreed to accept the agency, and that plaintiff should ship him, as such agent, $500 worth of his goods for sale; that plaintiff represented that such goods should be "good sellers," and told defendant that he would not be required to pay out any of his own money for the goods, and plaintiff was to send out, at his own expense, private letters and cards, the printing to be paid for by defendant; that he agreed to take the agency, provided the goods shipped were as represented, and he was to pay no money; that plaintiff said that he could not let his goods go on four months' time unless defendant would give him a note which he could use as collateral to borrow money, and, on the assurance that defendant would not have to pay the note, for the reason that before it matured he would have sold goods enough to meet it, he gave him a note for $250, not as purchase money, but as accommodation, and plaintiff was to send the goods for examination before he would accept them; that they were to be such as would be salable in the Mobile market; that the goods afterwards came by express, according to invoice sent with them, but were immediately returned to plaintiff, because not such as were promised to be sent, and were old style and unsalable.

A correspondence immediately sprang up between them, in which the one contended there was an absolute sale, and he would not receive the goods back, but would hold the other responsible for their value, and the other that the transaction was not a sale, but an agency, and he would have nothing more to do with the goods, and would not pay for them.

Finally, however, as the result of this correspondence, the defendant wrote to the plaintiff, under date of April 21, 1892, to the following effect: "I have reconsidered the matter, and will accept the goods on condition that you exchange some high-priced goods, which I will return, for cheaper articles, more suitable for this market. Please favor me with the retail selling price of said line of goods in the north. I do not understand the invoice you sent me, and therefore would like for you to send me another, more explicit, giving the net retail price, and then allow me the discount; also, send the show case, as promised. Let goods come along."

To this letter the plaintiff, on April 25th, after it was received, replied: "Thanks. Had much trouble, but all right now. Have sent you show case, and have told express company to deliver your goods. Most are marked, and you will find retail prices in this green circular, as sold by dealers here. You can exchange goods at any time. I was careful to send only good sellers, and, if not, will make all to your satisfaction. I will go on mailing private letters as soon as I get answer to this. Open up goods at once, and put out big pen, and push sales, and send me this note, and let us be good friends."

The evidence tends to show that the goods were shipped back to defendant by the express company, as requested by him, and in transit were lost or destroyed in a wreck. The defendant contends that the loss is the plaintiff's, that there was no delivery of the goods, for the reason that before accepting them he had the right to select from the lot such as he would return, according to the condition annexed to his agreement for them to be returned to him, and the sale, till this was done, was incomplete. On the other hand, the plaintiff maintains that the sale and delivery were complete, and the defendant is liable for the price of the goods, and must himself look to the express company for damages, if it has incurred liability for the nondelivery of the package.

The evidence tends to show, and it is without conflict as to the point, that the same package of goods, and the same goods that had in the first place been shipped to the defendant at Mobile by the plaintiff, which he received and examined, the invoice and prices for which had been furnished to him by plaintiff, and which he returned to plaintiff as not coming up to representations, were the identical package and goods which defendant, upon reconsideration, instructed the plaintiff to have returned to him by the express company. There was no mistake as to identity, quality, and price of goods. There had been, as we have seen, a spirited dispute between the parties as to the character of the transaction between them; the plaintiff maintaining all the while that defendant had purchased the goods, and that they were his property. The defendant finally yielded to plaintiff's contention, and wrote: "I have reconsidered the matter, and will accept the goods on condition that you exchange some high-priced goods, which I will return, for cheaper articles, more suitable for this market." What was it defendant had reconsidered? It could have been nothing but the very thing the plaintiff had been so pertinaciously pressing on him, —that the goods were sold and delivered to him, that the transaction was no agency, and he was liable, and must pay for what he had bought. He yielded the contention, and said, "I will accept the goods. * * * Let goods come along."

A sale has been defined to be "a transfer of the absolute or general property in a thing for a price in money." Benj. Sales, § 1. If anything remains to be done by either party to the transaction before delivery, as, for example, to determine the price, quantity, or identity of the thing sold, the title does not vest in the purchaser, and the contract is merely executory. If the sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the agreed price. Magee v. Billingsley, 3 Ala. 679; Mobile Sav. Bank v. Fry, 69 Ala. 348; s. c., 75 Ala. 473; Allen, Bethune & Co. v. Maury & Co., 66 Ala. 17; Wailes v. Howison, 93 Ala. 375, 9 South. 594; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; 2 Kent, Comm. 496.

In Allen, Bethune & Co. v. Maury & Co., supra, we said: "Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind, expressed within a reasonable time."

In Greene v. Lewis, 85 Ala. 221, 4 South. 740, 7 Am. St. Rep. 42, it was held that where a horse was sold and delivered to a purchaser for a reasonable price, to be afterwards agreed on, the title at once passed, and the fact that the parties could not afterwards agree on a reasonable price made no difference in the character of the transaction. The court, in passing upon the question, stated: "The rule is settled that the title to personal property may pass to a vendee without fixing an absolute price, if the circumstances attending the transaction satisfactorily show such to be the clear intention of the contracting parties." Shealy v. Edwards, 73 Ala. 175, 49 Am. Rep. 43; Wilkinson v. Williamson, 76 Ala. 163. An option to purchase, if the party to whom the goods are transferred should like, is very different from an option to return the goods if he should not like, them. In the first case, the title will not pass until the transferee determines the option, if seasonably exercised; in the other, the title passes subject to the right to rescind and return, which is, in effect, a right to resell to his vendor. 2 Benj. Sales, p. 796, § 915, note 30; Buswell v. Bicknell, 17 Me. 344, 35 Am. Dec. 262; Hunt v. Wyman, 100 Mass. 198. The case in hand was clearly one of a sale with right to rescind and return as to the high-priced goods.

The contract of sale between the parties, as we have seen, rested at first in parol, about the terms of which they disputed. They eventually agreed upon its terms, and that agreement is in writing. There could no longer remain any dispute about it, and no parol evidence was needed to construe it. Its construction became a question of law for the court, and not for the jury, to determine. Jones v. Pullen, 66 Ala. 306; Claghorn v. Lingo, 62 Ala. 230; Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; Guilmartin v. Wood, 76 Ala. 209.

It is unnecessary for us, in the view we take of the case, to consider any of the charges given to which exceptions were reserved, or any of the assignments of error, except the one based on the request for the general charge in favor of the plaintiff. The evidence is undisputed and in writing as to what the contract was, and, as its proper construction makes it one of sale and delivery of goods, the court should have given the general charge for the plaintiff, as requested.

Reversed and remanded.

## SECTION 4.—"CASH SALE"

### LEVEN v. SMITH.

(Supreme Court of New York, 1845. 1 Denio, 571.)

Error to the Kings common pleas, where Smith & Hartshorne brought replevin in the detinet against Leven for a quantity of boots and shoes. Plea, non detinet.

On the trial, the plaintiffs proved that on the 18th day of January, 1845, the defendant, who kept a store in Brooklyn, called at their store in the same city and agreed to purchase of them a bill of boots and shoes, which he selected, amounting to $184.25, to be paid for in cash on the delivery at the defendant's store. Lattimer, a person in the employ of the plaintiffs, and instructed by them to deliver the goods on payment of the money, and not otherwise, packed them in boxes and took them to the defendant's store, where they were compared with the bill and found to be correct, and then the defendant offered Lattimer eight dollars in money and a note of the plaintiffs payable to the order of Young & Shultz, and by them endorsed in blank for $176.23, on which some interest had accrued, in payment of the goods. Lattimer refused to receive the money and note as payment, but proposed to go back and see Mr. Smith, one of the plaintiffs, on the subject, and receive his directions. He accordingly immediately went and consulted Smith, who declined to receive payment in that way, and directed him to go and bring back the goods. He then went directly to the defendant's store, not having been absent from it more than four or five minutes, and required the goods to be returned or the money paid; but the defendant refused to pay or to give up the goods. Lattimer left the note on the defendant's desk on the same day, but not until after the service of the replevin, and he left the money there two days afterwards.

The defendant moved for a nonsuit, which was denied, and he excepted. Some evidence tending to vary in unimportant particulars the case made by the plaintiffs was given by the defendant; and upon his resting the plaintiffs gave evidence tending to prove that the defendant obtained the note referred to, of Young & Shultz, under an understanding that he was to pay the amount if he obtained the goods upon it, otherwise he was to return it.

Several objections were made to the admission and rejection of testimony, and the defendant excepted to the ruling of the court upon these objections in several instances, which, however, present no questions of general interest.

The court charged the jury, that if the goods were sold for cash, to be paid for on delivery, the sale was conditional and the property did not pass until the condition was complied with; and also, that if the note was in fact obtained from Young & Shultz under such agreement as is above mentioned, the plaintiffs would for that reason be entitled to recover. The defendant's counsel excepted to the charge, and likewise presented several propositions according to which he desired that it might be modified; but the court declined to charge as requested, and the defendant excepted. The jury found a verdict for the plaintiffs, upon which the court rendered judgment. A bill of exceptions was duly signed.

JEWETT, J. The goods in question were sold by the plaintiffs to the defendant for cash, to be paid on delivery. Payment and delivery were to have been simultaneous. No credit was given, and there is no evidence that the delivery to the defendant was intended to be absolute, or that the condition of payment was waived; and the mere handing over the goods under the expectation of immediate payment, did not constitute an absolute delivery. The defendant, after such delivery, held the goods in trust for the plaintiffs until payment was made or waived. Haggerty v. Palmer, 6 John. Ch. (N. Y.) 437; 2 Kent's Com. Lect. 39; Whitwell v. Vincent, 4 Pick. (Mass.) 449, 16 Am. Dec. 355; Furniss v. Hone, 8 Wend. (N. Y.) 247; Russell v. Minor, 22 Wend. (N. Y.) 659; Acker v. Campbell, 23 Wend. (N. Y.) 372. The defendant having got the goods into his possession, refused to pay cash for them as he had agreed to do. The plaintiffs demanded them of him and he refused to deliver them up, upon which this action was brought. I think it is well sustained.

The questions arising on the trial respecting the admission and rejection of evidence were correctly determined by the court. The charge, so far as it lays down the principles of law applicable to such a sale as that which was proved, was substantially correct.

In regard to the effect of obtaining the note in the manner mentioned, the charge was not strictly correct, but it embraced a subject not in the case. It was quite immaterial whether the defendant was the owner of the note, or was the agent of Young & Shultz in making an experiment to obtain payment for them. The charge in that particular was entirely harmless, and forms no ground for a writ of error. Hayden v. Palmer, 2 Hill (N. Y.) 205; People v. Wiley, 3 Hill (N. Y.) 214.

The request for further instructions to the jury was properly denied. The propositions submitted were either merely speculative or obviously incorrect.

Judgment affirmed.

## CLARK v. GREELEY.

(Supreme Court of New Hampshire, 1882. 62 N. H. 394.)

Assumpsit, to recover for goods sold. Facts found by a referee. The plaintiff made an auction in April, 1880, at which the defendant bid off the property named in the specification at the prices therein designated. He has never paid for the same, nor taken the property away. The defendant claimed that the plaintiff was owing him about $50 for some wood. This claim the plaintiff denies. At a previous auction of the plaintiff, in the fall of 1879, the defendant bid off some property of less amount and value than the amount of his claim against the plaintiff, for which he has never paid, claiming that he had the right to set it off as a payment by her pro tanto of his claim against her. The plaintiff was and is a person in good credit, and able to pay her debts. The defendant went to the auction in April, for the purpose of buying property to satisfy his claim against the plaintiff. The auctioneer set up the property at auction, previously stating, in the defendant's presence, that the property was to be sold for cash down, as the plaintiff was about to leave town. The stove was sold with the reservation that it was to remain in the house a few days for the use of the plaintiff's family. The defendant, having his account book with him, went into the house immediately after the sale and told the plaintiff he was ready to settle his account. She said the terms of the auction were cash down, and she was going to have the money for the articles he had bought. The defendant refused to pay for them, but claimed the right to take away the property. He then went out, intending to take away the carriage and sleighs, but could not find them. The defendant is a person in good credit, and able to pay his bills. The next morning the defendant learned that the property which he had bid off had since been attached on two writs against the plaintiff. He then brought a suit upon his previous claim against the plaintiff, and attached the property which he had bid off at the auction, his attachment being made and returned subject to the two prior attachments. The three writs against the plaintiff are still pending. The court ordered judgment on the report for the defendant, and the plaintiff excepted.

Clark, J. To maintain an action for goods bargained and sold, the contract of sale must be so far completed as to vest the title in the buyer. As between the parties, delivery is not essential to a completed sale, except when required by the statute of frauds. As a general rule, under a contract of sale of specific chattels at a stipulated price, when nothing remains to be done to designate the property sold or the price to be paid, the title, independently of the statute of frauds, immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Clark v. Draper, 19 N. H. 419, 421; Bailey v. Smith, 43 N. H. 141, 143; Townsend v. Hargraves, 118 Mass. 325, 332; Phillips v. Moor, 71 Me. 78; Dixon v. Yates, 5 B. & Ad. 313, 340. Although the title passes so as to subject the buyer to the risk of future injury to the property, the right of possession does not pass but is dependent upon the payment of the price. In the absence of any agreement, payment and delivery are to be concurrent acts, and the seller has the right to retain the possession until the price is paid. Upon proof of a readiness to deliver the goods the seller may maintain an action for the price, and upon a tender of the price the buyer may maintain an action for the goods.

A sale of chattels may be conditional. The payment of the price may be made a condition precedent to the transfer of the title, and in such a case the property will not pass although the goods are delivered. A sale for cash is not necessarily a conditional sale. Scudder v. Bradbury, 106 Mass. 422. The phrases "terms cash" and "cash down" may or may not import that payment of the price is made a condition precedent to the transfer of the title, according to the intent of the parties. If by the use of these terms the parties understand merely that no credit is to be given, and that the seller will insist on his right to retain the possession of the goods until the payment of the price, the sale is still so far completed and absolute that the property passes; but if it is understood that the goods are to remain the property of the seller until the price is paid, the sale is conditional and the title does not pass.

In the present case the sale was by auction and the terms were "cash down." When the auctioneer's hammer fell nothing remained to be done to designate the property sold or to put it in condition for delivery, and the title passed immediately to the defendant unless the parties intended otherwise. The question of intention is one of fact, which the referee has determined by his general finding in favor of the plaintiff. If a formal offer to deliver the goods would ordinarily be required before an action for the price could be maintained, the absolute refusal of the defendant to pay rendered an offer unnecessary in this case (Haines v. Tucker, 50 N. H. 307); and if no other facts appeared, the plaintiff would be entitled to judgment. It must appear not only that the plaintiff was ready to deliver the property upon payment of the price when her suit was commenced, but that she is still ready to deliver it, or is in no fault for not being able to do so. She is warrantor of the title, and if the title fails she cannot recover the price. The case finds that the goods bid off by the defendant were attached by the creditors of the plaintiff. If the attachment put it out of her power to deliver the goods, she cannot recover in this action; if she could, the defendant could immediately recover it back of the plaintiff as warrantor. It is suggested that this question does not arise in respect to the stove. If the case is amended to show that fact, the exceptions must be sustained as to the stove and overruled as to the other articles.

Case discharged.

STANLEY, J., did not sit; the others concurred.[15]

## STONE v. PERRY.

(Supreme Judicial Court of Maine, 1872. 60 Me. 48.)

Replevin for one hundred barrels of flour, which the defendant as sheriff of this county had attached as the property of Alonzo Butler, of Portland.

It appeared, on the part of plaintiffs, that on July 5, 1871, a broker called at plaintiffs' place of business in Boston, and inquired the price per barrel of one hundred barrels of flour of a certain brand; plaintiffs asked whom it was for, and the broker replied, Butler, of Portland; plaintiff said he did not know him, but would sell the flour at $8.75 for cash; that he went away, and soon returned, and said he would take the flour; that the flour was shipped to A. Butler & Co., on Friday, July 7th; that on the next day plaintiffs forwarded to A. Butler & Co., a bill of the flour, with the words "terms cash" printed on the margin thereof; that on the following Monday, one of the plaintiffs went to Portland, and ascertaining that A. Butler & Co. had failed, and that the flour had been attached by one of the previous debtors of Butler, replevied it from the officer.

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[15] But see Hand v. Matthews, 208 Pa. 149, 57 Atl. 351 (1904).

It also appeared that under the custom and usage of trade in Boston, when flour is sold for cash, it means that the seller has the right to call for the pay at any time he pleases, but the custom is not to call until ten days; that there is no credit in the flour business unless the time is specified; that ten days is a courtesy and not a right, and is so defined in the rules of exchange.

On the part of the defense it appeared that the broker offered plaintiffs for Butler $8.75, and if he did not remit in ten days to draw at sight, and not on demand; and that plaintiffs said they would ship the first one hundred barrels they received.

The full court, to render such judgment as the legal rights of the parties required.

Appleton, C. J. The plaintiffs, merchants in Boston, through the intervention of a broker, on July 5, 1871, sold to A. Butler & Co., one hundred barrels of flour, which they shipped on Friday, the 7th July. The sale was for cash. The bill of goods, which was forwarded on 8th July, had on the margin the words, "terms cash." On Monday, one of the plaintiffs went to Portland, and, finding the firm of Butler & Co. had failed, and that the flour had been attached, commenced an action of replevin.

The sale to Butler & Co. was conditional. The condition has not been complied with. The attaching creditor can only acquire the right of his debtor. As between vendor and vendee, the vendor is to be deemed the owner. In Deshon v. Bigelow, 8 Gray (Mass.) 159, the sale was for cash, and being conditional, it was held that the title did not pass to the vendee until payment, although the goods sold were delivered to the vendee. So when goods are sold on time, and delivered the vendee, it being part of the contract that they are to be paid for by the negotiable note of the vendee, such payment is a condition precedent to the sale, and the title to the goods will not vest without such payment or a waiver of it. Whitney v. Eaton, 15 Gray (Mass.) 225; Farlow v. Ellis, 15 Gray (Mass.) 229; in Hirschorn v. Canney, 98 Mass. 149, a merchant in New York sold goods to a merchant in Boston, on condition that he should send his notes in payment therefor, and shipped the goods to Boston, mailing a bill of lading to the vendee, and requesting him to send his notes in payment, which was never done. It was held, that no title passed to the conditional vendee. "The sale to the defendants," observes Gray, J., in Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137, "having been found by the jury to have been for cash, was a conditional sale, and vested no title in the purchasers, until the terms of sale had been complied with."

If goods are sold conditionally, and delivery made according to the custom of the trade, before the conditions are complied with, in expectation of compliance, the delivery is also conditional, and no title vests in the purchaser until performance of the condition; and if he steadily refuse compliance, the seller may recover the goods by action of replevin. Bauendahl v. Horr, 7 Blatchf. 548, Fed. Cas. No. 1,113.

The contract was made in Massachusetts, and the law of that place must govern. By that law, the sale being upon the condition of payment in cash upon delivery, no payment being made, the title of the vendor remains as between him and his vendee, or as between him and the attaching creditors of the vendee, in the former. The plaintiffs never parted with their title in Massachusetts, and their vendee has not acquired any.

There has been no waiver, nor is there any proof tending to show a waiver on the part of the plaintiffs, of any of their legal rights. On the contrary, they have been vigilant in their enforcement. The fact that the goods were actually forwarded to the purchaser before a compliance with the terms of sale is not necessarily a waiver of the conditions of sale. Farlow v. Ellis. Whether a delivery under an agreement for the sale of chattels is absolute or conditional, depends upon the intent of the parties; to establish that the delivery was conditional, it is not necessary that the vendor should declare the conditions in express terms, at the time of delivery. It is sufficient, if the intent of the parties can be inferred from their acts or the circumstances of the case. Hammett v. Linneman, 48 N. Y. 399.

The defendant having wrongfully interfered with the property of the plaintiffs, is liable in tort for such interference without demand.

Judgment for plaintiffs, and one cent damage.

KENT, WALTON, DICKERSON, and DANFORTH, JJ., concurred.

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## GEORGE W. MERRILL FURNITURE CO. v. HILL.

(Supreme Judicial Court of Maine, 1894. 87 Me. 17, 32 Atl. 712.)

WISWELL, J.[16] On about March 20, 1891, one Coburn, then the proprietor of an hotel in Bangor, ordered of the plaintiffs two settees, the property replevied, the same to be manufactured by the plaintiffs. On the 25th of April following, the settees, having been completed, were delivered at the hotel occupied by Coburn. Between that time and the 19th of the following June the plaintiffs called upon Coburn at various times for the purpose of collecting the pay for these articles, and on the latter date, nothing having been paid up to that time, and Coburn being still unable to pay, one of the plaintiffs proposed that Coburn should sign the written instrument, called by the witnesses a "lease," but in fact a contract providing that Coburn should pay the plaintiffs $10 per month for the use of the articles until the sum of $51 was paid, when the sums so paid should be treated as purchase money, and the property pass to Coburn. This instrument was never recorded.

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[16] The statement of facts is omitted.

In the month of September following, the defendant bought these settees, with other hotel furnishings, of Coburn, without notice of any claim upon them of the plaintiffs. The plaintiffs brought this action of replevin to recover possession of these settees.

The presiding justice instructed the jury that the question was principally, if not altogether, of law, and at the close of the charge said: "If you believe the testimony, I do not see any other way but to give a verdict for the plaintiffs." An examination of the evidence will show that this was in effect a direction to return a verdict for the plaintiffs.

At the time the goods were ordered, nothing was said about the time of payment, and no agreement was made by the plaintiffs to give credit. Under these circumstances, the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. The plaintiffs would have had the right to retain possession until the purchaser had been ready to perform his part of the contract, or, if the goods had been delivered with the expectation of immediate payment, and this had not been done, the plaintiffs had the right to retake possession of the goods.

But although a sale of this character is conditional, and a vendor has the right to retain possession, or to retake possession under certain circumstances, the vendor may waive the conditions and these rights, in which case the sale becomes absolute, and the title vests in the purchaser. Peabody v. Maguire, 79 Me. 572, 12 Atl. 630.

The mere fact of delivery without a performance of the condition of payment is some evidence of a waiver of the condition. The rule that prevails in this state is thus stated in Peabody v. Maguire, supra: "But the doctrine which has the support of our own court upon this question, and which seems to be the correct and rational one, is that, even in a conditional sale, the mere fact of delivery, without a performance by the purchaser of the terms and conditions of sale, and without anything being said about the condition, although it may afford presumptive evidence of an absolute delivery and of a waiver of the condition, yet it may be controlled and explained, and is not necessarily an absolute delivery or waiver of the condition; but whether so or not is a question of fact to be ascertained from the testimony."

In this case there was a delivery of the goods "without a performance by the purchaser of the terms and conditions of sale, and without anything being said about the condition." This was some evidence of a waiver by the plaintiffs of their rights. It might be controlled or explained by other circumstances, but we think that it was a question for the jury, and that it was error to direct, in effect, a verdict for the plaintiffs.

If the evidence was such that a verdict for the defendant would have been so clearly erroneous as to require it to be set aside, then the defendant could not complain of the instruction; but we do not think that such is the case. There are undoubtedly circumstances which have some bearing in favor of the contention on each side. For instance, one of the plaintiffs, and the one who had most to do with the transaction, testified upon cross-examination that when the goods were delivered he considered Mr. Coburn good, and "expected the cash in thirty days." From this evidence, taken in connection with the unrestricted delivery, the jury would have been authorized in finding a waiver.

If the property passed by delivery, then the unrecorded instrument executed upon June 19th, but bearing date of April 25th, was ineffectual to give the plaintiffs any claim upon these goods as against the defendant. Upon the other hand, if the title did not pass, the parties merely substituted one conditional contract for another, as they might with propriety have done. So the case depends entirely upon the question of fact as to whether or not the property passed at the time of delivery. This issue, we think, should have been submitted to the jury.

Exceptions sustained.

## FRECH v. LEWIS.

(Supreme Court of Pennsylvania, 1907. 218 Pa. 141, 67 Atl. 45, 11 L. R. A. [N. S.] 948, 120 Am. St. Rep. 864, 11 Ann. Cas. 545.)

STEWART, J. The settled doctrine of our cases is to the effect that where the contract of sale provides for payment of the purchase price on delivery of the articles sold, and the seller delivers the goods, but the buyer fails to pay, the right of property does not pass to the buyer with the possession, but remains with the seller, who may at his option reclaim the goods. In some jurisdictions the right of property is held to pass with the delivery, unless at the time the right to retake is expressly declared by the seller. We have not gone so far. Our cases proceed on the theory that until payment has been made, or waived, the contract remains executory, and that delivery in such case is not a completion of the contract, except as an intention to so regard it is expressly declared or can fairly be inferred from the circumstances attending. Possession, however, having passed, and the buyer by the act of the seller having been invested with the indicia of ownership, the policy of our law requires that this situation—the possession in one and the right of property in another—shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right in such case to reclaim his goods, but he must do so promptly. Otherwise he will be held to have waived his right, and can only thereafter look to the buyer for the price.

The question the present case suggests is: When does this inference of waiver arise? Our authorities admit of but one answer: Except when delayed by trick or artifice, the assertion of the right to reclaim the property must follow immediately upon the buyer's default. This does not mean that the seller must eo instanti begin legal proceedings to recover the goods; but it does mean that the seller, when he discovers that his delivery is not followed by payment, as he had the right to expect, is at once put to his election whether he will waive the condition as to payment and allow the delivery to become absolute, or retake property, and that he is to allow no unnecessary delay in making his choice. The object of the law is not to multiply his remedies because of his disappointment. He may not continue to hold his right to the goods, and at the same time hold the buyer as his creditor. One or the other he must relinquish, and do it promptly, or the law will forfeit his right to elect. Continued acquiescence in the buyer's possession of the goods will be taken as a choice on his part to regard the delivery as absolute, notwithstanding the buyer's default. The policy of the law, in requiring promptitude in the assertion of continued ownership of the goods, could easily be vindicated were it necessary. It answers every purpose here to show that the law requires it.

In Leedom v. Philips, 1 Yeates (Pa.) 527, it is said: "When the parties specially agree, it is obvious that the vendor may, by his contract, renounce the benefit of the conditions stipulated, and trust to the good faith of the vendee for a future performance on his part. If one sells goods for cash, and the vendee takes them away without payment of the money, the vendor should immediately reclaim them by pursuing the party, and he may justify the retaking of them by force." This was quoted approvingly in Bowen et al. v. Burk, 13 Pa. 146; and it was there added that: "Where he [the seller] lies by, and makes no complaint in a reasonable time, he consents to the absolute transfer of the property, and the contract is consequently complete against all the world."

In Backentoss v. Speicher, 31 Pa. 324, reference is made to the case last above cited. What we have quoted from it was there approved, and the necessity for an immediate reclamation of the goods was emphasized. It is there said: "This is the principle that is decisive against the present plaintiff. A sale of goods for cash is, strictly speaking, a sale on condition. The contract is do ut des. The condition is more imperative than such as was in this case, but for that reason less easily waived; and yet, if the vendor acquiesced in a possession obtained in disregard of the condition, he waives it, and, though he may recover the price by action, he cannot recover the goods in specie. * * * When the plaintiff found his condition disregarded, he should have promptly reclaimed the goods."

Mackaness v. Long, 85 Pa. 158, is another recognition of the same doctrine that unless reclamation of the property be made immediately the title passes to the buyer. These cases and others that might be cited, following the lead of Leedom v. Philips, 1 Yeates (Pa.) 527, all hold that the duty is upon the seller if he would retain his right to the property to proceed promptly, and we know of no case in which a contrary doctrine is asserted. In some cases, the expression "within a reasonable time" is used where the right to reclaim is referred to; but this expression suggests no departure from the rule as declared in Leedom v. Philips, supra. By "reasonable time" is to be understood such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay, or in a delay occasioned by the vain hope and fruitless effort to obtain the money from the defaulting buyer. When the delay is to be accounted for by the latter consideration, it is accepted as an acquiescence in the delivery and the acceptance of the buyer as a debtor.

Now for the facts of this case: The contract was that plaintiff was to furnish defendant with two carriages to be paid for on delivery. The first carriage was delivered September 4, 1903, through plaintiff's son, who immediately demanded of the defendant payment for the same. Defendant's response was: "I will be over in a day or two to see your father, and, if I do not, I will send him a check in the course of a day or two." He failed to keep his promise. He neither went to see plaintiff, nor did he send the check. Nevertheless, three days after this the other wagon was delivered to him at the same place, while he was absent from home. A week or ten days thereafter the plaintiff demanded payment, and repeated the demand both personally and by letter time and time again, with no better result than to get a note from the defendant, which he accepted conditionally, but which he returned because he was unable to get it discounted. Meanwhile defendant was using the carriages, as plaintiff must have known, since he repaired one of them which had been injured in the using. While plaintiff was diligent and persistent in demanding payment, at no time did he demand a return of the carriages, or in any way assert his right to property in them. His effort was, as he himself testified, to coax the defendant into paying the price. Two months and a half elapsed before he began this action of replevin, which was his first assertion of continued ownership of the property. It was not only too late, but his conduct shows that during all this time he was dealing with the defendant as though the latter was his debtor. His own explanation is that he delayed trusting to the promises of the defendant from time to time to pay the price of the carriages.

The title to a chattel passes as fully after a conditional delivery, where possession is allowed to be retained, in consideration of a new promise to pay, as where delivery is preceded by actual payment. The plaintiff was not tricked into delivering the carriages to the defendant, nor was his delay in asserting claim to the property in consequence of any fraud practiced. He reposed confidence in the promise of the defendant, and was disappointed. His disappointment does not restore to him the right of property with which he parted. The court below submitted it to the jury to determine whether plaintiff by his conduct had waived his right to retake the carriages. The jury found he had not, and gave the plaintiff a verdict for the property. On appeal to the superior court the judgment of the lower court was affirmed. The ground on which the affirmance rested is thus stated by the learned judge who delivered the opinion: "It cannot be said as matter of law that the plaintiff's conduct amounted to a waiver of his right. In view of the repeated promises of the defendant, the plaintiff might well have been misled and induced to postpone proceedings for the recovery of his property. His delay is evidence of a waiver, but it is not conclusive in view of the conduct of the defendant."

In this we cannot concur. The reasons for our dissent fully appear in what we have already said. Reliance upon a subsequent promise to pay, that leads the seller to refrain from asserting his right to retake the property, is in itself a waiver of the right, and makes absolute a delivery which in the first instance was conditional. The right of plaintiff to recover back his property after he had delivered it resulted from the buyer's failure to keep his first promise. His failure to keep subsequent promises to pay could neither prolong nor revive that right. What defendant did or did not do is a matter that has no place in the inquiry; what the plaintiff did or failed to do is the determining consideration. Fraud and artifice practiced by defendant may excuse delay in attempting a recovery of property after delivery, but not mistaken confidence reposed in defendant's promises.

Judgment is reversed.[17]

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[17] Compare Hammett v. Linneman, 48 N. Y. 399 (1872). And see, further, on the subject of waiver, Johnson v. Iankovetz, 57 Or. 28, 110 Pac. 398, 29 L. R. A. (N. S.) 709 (1910), with a criticism in 9 Mich. Law Rev. 239.

## SECTION 5.—CONTRACT TO SELL UNASCERTAINED GOODS OF A FUNGIBLE NATURE

### WHITEHOUSE et al. v. FROST.

(Court of King's Bench, 1810. 12 East, 614.)

In trover to recover the value of some oil, the property of the bankrupt, which was tried at Lancaster, in March last, a verdict was found for the plaintiffs for £390, subject to the opinion of the court on the following case:

The plaintiffs are assignees of John Townsend, late a merchant at Liverpool; the two Frosts are merchants and partners in Liverpool; and the other defendants, Dutton & Bancroft, are also merchants and partners in the same town. On the 7th of February, 1809, Townsend purchased from the defendants, J. & L. Frost, ten tons of oil, at £39 per ton, amounting to £390, for which Townsend was to give his acceptance payable four months after date; and a bill of parcels was rendered to Townsend by the Frosts, a copy of which is as follows:

"Liverpool, 7th February, 1809. Mr. John Townsend, Bought of J. & L. Frost,

Ten tons Greenland whale oil in Mr. Staniforth's cisterns, at your risk, at £39.................................................... £390

Cr.

1809. February 14. By acceptance.................................. £390

"For J. & L. F., Wm. Pemberton."

The said ten tons of oil at the time of this purchase were part of forty tons of oil lying in one of the cisterns in the oil-house at Liverpool, the key of which cistern was in the custody of the other defendants, Dutton & Bancroft, who had before that time purchased from J. R. & J. Freme, of Liverpool, merchants, the said forty tons of oil in the same cistern; and upon such purchase received from the Fremes the key of the cistern. Afterwards Dutton & Brancroft sold ten of the forty tons they had so bought (being the ten tons in question) to the defendants, the Frosts, who sold the same in the manner before stated to Townsend. On the 7th of February, the day on which Townsend bought the ten tons of oil, he received from the defendants, Frosts, an order on Dutton & Bancroft, who held the key of such cistern, they having other interests therein as aforesaid, to deliver to him, Townsend, the said ten tons of oil; a copy of which is as follows:

"Messrs. Dutton & Bancroft, Please to deliver the bearer, Mr. John Townsend, ten tons Greenland whale oil, we purchased from you 8th November last." (Signed) "J. & L. Frost."

The order was taken to Dutton & Bancroft by Townsend, and accepted by them upon the face of the order as follows: "1809. Accepted, 14th February. Dutton & Bancroft." Townsend according to the terms of the bill of parcels, namely, on the 14th of February, 1809, gave to the defendants, Frosts, his acceptance for the amount of the oil, payable four months after date; but which acceptance has not been paid. Townsend never demanded the oil from Dutton & Bancroft, who had the custody of it. The oil was not subject to any rent; the original importer having paid the rent for twelve months, and sold it rent free for that time, which was not expired at Townsend's bankruptcy.

On the 23d of May, 1809, about three months after the purchase of the ten tons of oil, a commission of bankrupt issued against Townsend, under which he was duly declared a bankrupt, and the plaintiffs appointed his assignees. At the time of the purchase, and also at the time of Townsend's being declared a bankrupt, the oil was lying in the cistern mixed with other oil in the same; and some time afterwards the defendants refused to deliver the same to the plaintiffs, notwithstanding a demand was made for the same by the assignees, and a tender of any charges due in respect thereof. When the whole of the oil lying in any of the cisterns in the oil-house is sold to one person, the purchaser receives the key of the cistern; but when a small parcel is sold, the key remains with the original owner; and the purchaser is charged in proportion to the quantity of oil sold, with rent for the same, until delivered out of the oil-house, unless such rent be paid by the original importer, as was the fact in the present case. If the plaintiffs were entitled to recover the verdict was to stand; if not, a nonsuit was to be entered.

There was a similar action by the same plaintiffs against J. R. Freme and J. Freme, Dutton, and Bancroft, the circumstances of which were in substance the same.

Lord ELLENBOROUGH, C. J. This case presents a difference from the ordinary cases which have occurred where the sale has been of chattels in their nature several, and where the transfer of the property from the vendor by means of an order for delivery addressed to the wharfinger or other person in whose keeping they were, and accepted by him, has been held to be equivalent to an actual delivery; the goods being at the time capable of being delivered. Here, however, there is this distinguishing circumstance, that the ten tons of oil till measured off from the rest was not capable of a separate delivery; and the question is, whether that be a distinction in substance or in semblance only. The whole forty tons were at one time the property of Dutton & Bancroft, who had the key of the cistern which contained them; and they sold ten tons to the Frosts, who sold the same to Townsend, the bankrupt, and gave him at the same time an order on Dutton & Bancroft for the delivery to him of the ten tons.

To that order Dutton & Bancroft attorn, as I may say; for they accept the order, by writing upon it "Accepted 14th of February, 1809," and signing their names to it. From that moment they became the bailees of Townsend, the vendee; the goods had arrived at their journey's end, and were not in transitu; all the right then of the sellers was gone by the transfer, and they could no longer control that delivery to which they had virtually acceded by means of their order on Dutton & Bancroft accepted by the latter. The question of stopping in transitu does not arise, taking the Frosts to be the original sellers, as between them and the bankrupt; the oil had never been in the hands of the Frosts; they only assigned a right to it in the hands of the common bailees, which before had been assigned to them.

Grose, J. There can be no doubt that at the time of Townsend's bankruptcy the ten tons of oil in the cistern were at the risk of the bankrupt. All the delivery which could take place between these parties had taken place. Dutton & Bancroft, who had the custody of the whole in their cistern, had accepted the order of the sellers for the delivery to the bankrupt, and it only remained for Townsend, together with Dutton & Bancroft, to draw off the ten tons from the rest.

Le Blanc, J. Dutton & Bancroft had sold the ten tons of oil in question (which was part of a larger quantity, the whole of which was under their lock and key) to the Frosts, who sold the same to Townsend; and there is no claim on the part of the defendants, Dutton & Bancroft, to detain the oil for warehouse rent. The Frosts never had any other possession of the oil than through Dutton & Bancroft; but they gave to Townsend an order on these latter to deliver it to him; and after the acceptance of that order Dutton & Bancroft held it for his use. But something, it is said, still remained to be done, namely, the measuring off of the ten tons from the rest of the oil. Nothing, however, remained to be done in order to complete the sale. The objection only applies where something remains to be done as between the buyer and seller, or for the purpose of ascertaining either the quantity or the price, neither of which remained to be done in this case; for it was admitted by the persons who were to make the delivery to Townsend, that the quantity mentioned in the order was in the cistern in their custody, for they had before sold that quantity to the Frosts, of whom Townsend purchased it, and had received the price. Therefore, though something remained to be done as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold, yet as between him and his vendors nothing remained to perfect the sale.

Bayley, J. There is no question of transitus here; the goods were at their journey's end. When, therefore, Dutton & Bancroft, who were then the owners of the whole, sold ten tons of the oil to the Frosts, those ten tons became the property of the Frosts; and when they sold the same to Townsend, and gave him an order upon Dutton & Bancroft for the delivery of the ten tons purchased of them, the effect of that order was to direct Dutton & Bancroft to consider as the property of Townsend the ten tons in their possession, which before was considered as the property of the Frosts; and by the acceptance of that order Dutton & Bancroft admitted that they held the ten tons for Townsend, as his property; and he had a right to go and take it, without the interference of the Frosts.

Postea to the plaintiffs.[18]

## KNIGHTS v. WIFFEN.

(Court of Queen's Bench, 1870. L. R. 5 Q. B. 660.)

Declaration for conversion of sixty quarters of barley of the plaintiff.

Pleas: 1. Not guilty. 2. That the barley was not the property of the plaintiff.

Issue thereon.

At the trial before Keating, J., at the Surrey Spring Assizes, it appeared that the defendant, a corn-merchant, had a large quantity of barley, in sacks, lying in his granary, which adjoined the Stanstead Station of the Great Eastern Railway. He sold eighty quarters of this barley to one Maris, but no particular sacks were appropriated to the purchaser. While the barley remained in the defendant's granary, subject to the orders of Maris, the latter sold sixty quarters of it to the plaintiff, who paid him for them, and received from him the following delivery order addressed, as was usual in similar transactions, to the "Station-Master, Stanstead—Sir: Deliver Mr. T. Knights sixty quarters of barley to my order, R. W. Maris, Jun., June 27th, 1868." Underneath was written: "Thomas Knights, Jun., Hemingford Gray, near St. Ives, Huntingdonshire." The plaintiff sent this document to the station-master, and wrote with it: "Sir:

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[18] In Austin v. Craven, 4 Taunt. 644 (1812), where the sale was of 50 hogsheads of sugar, double loaves, no particular hogsheads being specified, Mansfield, C. J., said: "Trover cannot be maintained but for specific goods. Any sugars of required quality would have satisfied this contract. It is a contract for a certain quantity of a specified quality of sugars. I say nothing on the case of the oil; there it is held that trover will lie for a specific quantity of a liquid, mixed with a certain other quantity of the same liquid, without its ever having been separated; how it is to be distinguished from the mass, I know not; but that case stands quite on its own bottom; it is unlike other cases."

In Gillett v. Hill, 2 Cr. & Mee. 530 (1834), Bayley, B., said: "If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided."

In the fifth English edition of Benjamin on Sales, p. 338, note 4, the editors, referring to Whitehouse v. Frost, say: "As it has been frequently disapproved, though followed in America, it may be treated as of no authority here."

I enclose Mr. R. W. Maris, Jun.'s, transfer of sixty quarters of barley to my account. Please confirm this transfer, and send me a sample, and say what weight is in due course." On receipt of this letter and the delivery order, the station-master shewed them both to the defendant, who said, "All right, when you get the forwarding note I will put the barley on the line." Samples were afterwards given to the station-master, which were sent by him to the plaintiff. Three sacks were weighed. The plaintiff ultimately gave an order, or forwarding note, to the station-master, for the sixty quarters of barley to be sent to Cambridge, which he presented to the defendant, but Maris had then become bankrupt, and the defendant, as unpaid vendor, refused to part with the barley.

The learned judge directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for £53. 18s. 7d., the amount claimed.

A rule was obtained pursuant to the leave reserved, on the ground that there was evidence which ought to have been submitted to the jury to prove that the defendant had accepted, and agreed to act upon the delivery order of the vendee (Maris), and thus passed the property in the sixty sacks of barley; or for a new trial on the ground that the judge ought to have directed a verdict for the plaintiff for three sacks at least.

Blackburn, J. I think that the plaintiff is entitled to the verdict, and the rule should be made absolute to enter a verdict for him. I will state shortly what I consider to be the facts upon which the case seems to turn. The defendant Wiffen had in his own warehouse a large quantity of barley, and he sold to Maris eighty quarters which, on the contract between him and Maris, remained in his possession as unpaid vendor. No particular sacks of the barley were appropriated as between Maris and Wiffen; but at the time the contract was made Maris had a right to have eighty quarters out of that barley appropriated to him; and at the same time Wiffen, as the unpaid vendor, had a right to insist on the payment of the price before any part of the grain was given up. Maris afterwards entered into a contract with the plaintiff Knights by which he sold him sixty sacks of the barley, and Knights paid him for them. A document was given by Maris to Knights, in the shape of a delivery order addressed to a station-master of the Great Eastern Railway, instructing him to deliver to Knights' order sixty quarters of barley on his, Maris', account. Knights forwarded it to the station-master, enclosed in a letter authorizing the station-master to hold for him. The station-master went to Wiffen and shewed him the delivery order and letter, and Wiffen said: "All right, when you receive the forwarding note, I will place the barley on the line." What does that mean? It amounts to this, that Maris having given the order to enable Knights to obtain the barley, Wiffen recognized Knights as the person entitled to the possession of it. Knights had handed the delivery-order to the station-master, and Wiffen, when the document was shewn to him, said, in effect: "It is quite right; I have sixty quarters of barley to Maris' order. I will hold it for you; and when the forwarding note comes I will put it on the railway for you." Upon that statement Knights rested assured, and Wiffen, by accepting the transfer which had been informally addressed to the station-master, bound himself to Knights. The latter accordingly, when he did not get the goods, brought an action of trover against Wiffen, saying, as it were: "You said that you had the sixty quarters of barley, and that you would hold the goods for me. You cannot refuse to deliver to me; if you do refuse it will be a conversion." And Wiffen now says: "It is all true, but I do refuse to deliver the barley. Granted that I previously said I would hold sixty quarters of barley for you, yet I had none to hold for you. I had no quarters belonging to Maris, for I never severed them from the bulk, and I am entitled to hold the whole quantity as against Maris, until I am paid the full price."

No doubt the law is that until an appropriation from a bulk is made, so that the vendor has said what portion belongs to him and what portion belongs to the buyer, the goods remain in solido, and no property passes. But can Wiffen here be permitted to say: "I never set aside any quarters?" As to that, Woodley v. Coventry, 2 H. & C. 164, 32 L. J. (Ex.) 185, is very much in point; with this difference only, that there the plaintiff acted on the statement of the warehouseman, and altered his position by paying the vendee a part of the price, and so the doctrine of estoppel applied; which doctrine is—that where one states a thing to another, with a view to the other altering his position, or knowing that, as a reasonable man, he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement. Woodley had altered his position by paying part of the price, but Coventry did not know of it. In Stonard v. Dunkin, 2 Camp. 344, it is patent that the defendant knew the money was paid. In Hawes v. Watson, 2 B. & C. 540, it appears that payment had been made, but the defendant did not know of it, although, as a reasonable man, he might have known it was likely. But in neither of those cases did the defendants know that money was going to be paid. In the present case the money had been paid before the presentation of the delivery order; but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that, when he assented to the delivery order, the plaintiff, as a reasonable man, would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Maris and have demanded back his money, very likely he might not have derived much benefit if he had done so; but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. If once the fact is established, that the plaintiff's position is altered by relying on the statement and taking no steps further, the case becomes identical with Woodley v. Coventry, 2 H. & C. 164, 32 L. J. (Ex.) 185, and Hawes v. Watson, 2 B. & C. 540. It is to be observed, moreover, that the judgment of the Court in Woodley v. Coventry, 2 H. & C. 164, 32 L. J. (Ex.) 185, did not rest on the fact of the payment of the price. It will be noticed there that although the fact did exist of payment of price, Martin, B., seems to found his decision on the assenting to hold, and the fact that when that assent was communicated to the plaintiffs they altered their position. In Gillett v. Hill, 2 C. & M. 530, there was no payment of the price, and the Court of Exchequer gave judgment against the wharfingers, on the ground that they were estopped from denying the facts, after the other party had altered his position, relying on their conduct when the delivery order was presented. In the present case the plaintiff altered his position, relying on the defendant's conduct when the delivery order was presented. The plaintiff may well say: "I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true." [19]

## SCUDDER v. WORSTER et al.

(Supreme Judicial Court of Massachusetts, 1853. 11 Cush. 573.)

This was an action of replevin, for 150 barrels of pork, to which the defendants pleaded only the general issue. It was submitted to this court on an agreed statement of facts, which, so far as necessary to a proper understanding of the points involved, sufficiently appear in the opinion.

DEWEY, J.[20] * * * It appears from the facts stated, that on February 10, 1850, a contract was made by the defendants with Secomb, Taylor, & Company, to sell them 250 barrels of pork branded "Worcester & Hart"; that a bill of sale of the pork was made and delivered to them, and they gave the defendants their negotiable promissory notes of hand therefor, payable, in six months; that it was further agreed that the pork should remain in defendants' cellar on storage, at the risk and expense of the purchasers; that Secomb, Taylor, & Company, on the 13th of May, 1850, sold 100 barrels of the pork to one Lang, who received the same of the defendants upon the order of Secomb, Taylor, & Company; that on the 27th of May, 1850, Secomb, Taylor, & Company sold the plaintiff 150 barrels, with an order on the defendants therefor. The next day the plaintiff gave notice to the defendants of the purchase, and requested them to hold the same on storage for him, to which the defendants assented. On the 25th of June, Secomb, Taylor, & Company became insolvent, and on the same day the plaintiff called upon the defendants for the purpose of receiving the 150 barrels of pork, but the defendants refused to allow him to do so. On the next day a more formal demand, accompanied by an offer to pay storage, was made, which being refused by the defendants, an action of replevin was instituted, and 150 barrels of pork, the same now in controversy, were taken and removed from said cellar, and delivered to the plaintiff.

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[19] Concurring opinions were delivered by Mellor and Lush, JJ.

[20] Part of the opinion is omitted.

The further fact is stated in the case, and it is this which raises the question of property in the plaintiff, that the pork bargained and sold in the manner above stated was in the cellar of the defendants, and a parcel of a larger quantity of the same brand, and also with some of a different brand, and so continued parcel of a larger quantity of similar brand, up to the time of the suing out of the plaintiff's writ of replevin: though this fact was not at the time of the sale stated to the purchasers, or to the plaintiff when he purchased of Secomb, Taylor, & Company. Had these 250 barrels of pork been a separate parcel, or had the parties designated them by any visible mark, distinguishing them from the residue of the vendors' stock of pork, the sale would clearly have been an absolute one, and the property would at once have passed to the purchaser. There was nothing required to have been done but this separation from the general mass of like kind, to have placed the sale beyond all question or doubt as to its validity.

The cases cited by the plaintiff's counsel fully establish the position, that what was done in this case would have transferred the property in the pork, if the sale had been of all the pork in the cellar, or of any entire parcel separated from the residue, or if the 250 barrels had some descriptive mark distinguishing them from the other barrels not sold. The difficulty in the case is, in maintaining that in the absence of each and all these circumstances, distinguishing the articles sold, the particular barrels of pork selected by the officer from the larger mass when he served this process, were the property of the plaintiff, or had ever passed to him. In addition, however, to the numerous cases cited to establish the general principles contended for on the part of the plaintiff, and which would have been decisive, if it had been a sale of all the pork in the cellar or a particular parcel, or certain barrels having descriptive marks which would enable the vendee to separate his own from the residue, were cited several more immediately bearing upon the present case, and where property not separable has been held to pass to the vendee.

The leading case relied upon is that of Pleasants v. Pendleton, 27 Va. 475, 18 Am. Dec. 726. This was an action by the vendor to recover the price of 119 barrels of flour sold to the defendant. No other objection existed to the validity of the sale, except that the 119 barrels were a parcel of 123 barrels, all of similar kind, in the same warehouse. There were certain brands or marks on the entire 123 barrels. The flour was destroyed by fire while on storage, and the vendee refused to pay for the 119, upon the ground that the sale was not perfected for want of separation from the 123 barrels. The court refused to sustain the defence, and gave judgment for the plaintiff. In reference to this case, Grimke, J., in Woods v. McGee, 7 Ohio, 127, pt. 2, 30 Am. Dec. 220, says: "It is impossible to divest ourselves of the impression that the small difference between the aggregate mass and the quantity sold, the former being 123 barrels, and the latter 119, may have influenced the decision. It was a hard case, and hard cases make shipwreck of principles."

Jackson v. Anderson, 4 Taunt. 24, was an action of trover to recover for the conversion of 1969 Spanish dollars. It appeared that the amount had been transmitted to a consignee for the use of the plaintiff, but they were in a parcel of $4918, all of which came into the hands of the defendant. Among other points raised at the argument, was this, that there was nothing to distinguish the $1969 from the entire mass; that there had been no separation, and of course the plaintiff had no property in any particular portion of the money. The point, it seems, was not made at the trial before the jury, but suggested by the court during the argument before the full court, and this is stated by the reporter; the court interrupted the counsel, and intimated a strong doubt, as there was nothing to distinguish the $1969 from the remaining contents of the barrel, whether the action could lie. At a future day the court gave judgment for the plaintiff. The objection was overruled upon the ground that the defendant had disposed of all the dollars, consequently he had disposed of those belonging to the plaintiff.

The case of Gardner v. Dutch, 9 Mass. 427, is apparently the strongest case in favor of the plaintiff. The case was replevin against an officer who had attached goods as the property of Wellman & Ropes. The plaintiff had seventy-six bags of coffee, to which he became entitled as owner, upon an adjustment of accounts of a voyage he had performed for Wellman & Ropes, but the bags belonging to the plaintiff were in no way distinguished by marks, or separated from the other coffee of Wellman & Ropes. The plaintiff on his arrival at Salem, from his voyage, delivering the entire coffee to Wellman & Ropes, taking their receipt "for seventy-six bags of coffee, being his adventure on board schooner Liberty, and which we hold subject to his order at any time he may please to call for the same." The point taken in the case was that the plaintiff had not the sole property, but only an undivided interest, and so could not maintain replevin. The court ruled that the plaintiff was not a tenant in common, but might have taken the number of bags to which he was entitled, at his own selection, and might maintain his action.

This case, on the face of it, seems to go far to recognize the right of one having a definite number of barrels of any given articles mingled in a common mass, to select and take, to the number he is entitled, although no previous separation had taken place. It is, however, to be borne in mind in reference to this case, that it did not arise between vendor and vendee. The interest in the seventy-six bags of coffee did not originate by purchase from Wellman & Ropes. They became the specific property of the plaintiff in that action on an adjustment of an adventure, the whole proceeds of which were in his hands; and separated with the possession, only when he took their accountable receipts for seventy-six bags, held by them on his account. It did not raise the question, here so fully discussed, as to what is necessary to constitute a delivery, and how far it was necessary to have a separation from a mass of articles, to constitute a transfer of title. Perhaps the circumstances may well have warranted that decision, but we are not satisfied that the doctrine of it can be properly applied to a case where the party asserts his title, claiming only as a purchaser of a specific number of barrels, there having been no possession on his part, and no separation of the same from a larger mass of articles similar in kind, and no descriptive marks to designate them.

On the other hand, in support of the position that this sale was never perfected for want of such separation of the particular barrels on account of the plaintiff, or some designation of them from others of like kind, there will be found a strong weight of authority; and to some of the most prominent cases I will briefly refer. Thus, in the case of Hutchinson v. Hunter, 7 Pa. 140, which was an action of assumpsit to recover payment for 100 barrels of molasses sold to the defendant, the same being parcel of 125 barrels, and the whole destroyed by fire while on storage, and before separation or designation of any particular barrels, it was held that the plaintiff could not recover, the sale never having been consummated. Rogers, J., says: "The fundamental rule which applies to this case is, that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale. The goods must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass." He considers the case of Pleasants v. Pendleton, 27 Va. 475, 18 Am. Dec. 726, as decided on erroneous principles.

The case of Hutchinson v. Hunter presented a case of a sub-contract or sale like the present, and it was urged that this differed the case from what it might otherwise have been, as respects the original vendor. But the court held that this did not vary the case in the matter of the necessity of a separation of the article sold from the greater mass. So in Golder v. Ogden, 15 Pa. 528, 53 Am. Dec. 618, where a contract was made for the sale of 2000 pieces of wall paper, the purchaser giving his notes therefor to the vendor, and taking away with him 1000 pieces, and it was agreed that the other 1000 pieces should remain until called for by the purchaser, upon a question of property in the remaining 1000 pieces between the assignees of the vendor and the purchaser, it was held that these 1000 pieces not having been selected by the buyer, or separated, or set apart for him, but remaining mingled with other paper of same description, did not become the property of the alleged buyer, as against an assignment for the benefit of the creditors of the vendor. The principle advanced in that case seems to be the sound one: "That the property cannot pass until there be a specific identification in some way of the particular goods which the party bargains for. The law knows no such thing as a floating right of property, which may attach itself either to one parcel or the other, as may be found convenient afterwards."

The case of Waldo v. Belcher, 33 N. C. 609, was the case of a sale of corn by a vendor, having in his store 3100 bushels of corn, and selling 2800 bushels of the same, but the 2800 bushels were never separated from the 3100, and the whole was, after the sale, destroyed by fire; and it was held that the property in the 2800 bushels did not pass to the vendee, though it would have been otherwise had it been a sale of all the corn in the crib. The ground of the decision was, that there had been no separation, that it could not be ascertained which corn was the property of the vendee until it was separated. The purchaser could not bring detinue, because he could not describe the particular thing. This would be equally so as to replevin.

The case of Merrill v. Hunnewell, 13 Pick. (Mass.) 213, bears strongly upon the question before us. It was a sale of nine arches of brick in a kiln containing a larger number, but not separated from the residue, or specifically designated. After the vendor had, by other sales, reduced the quantity on hand to less than nine arches, upon a question of property between the vendee and an attaching creditor of the vendor, it was held the purchaser took no property in the bricks, the sale being of part of a large mass not delivered nor specifically designated.

Blackburn, in his Treatise on Sales, p. 20, presents the law on this subject thus: "Until the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold."

Examining the facts in the case before us, and applying the principles of the cases last cited, and the approved elementary doctrine as to what is necessary to constitute a sale of property not separated from the mass of like kind, or designated by any descriptive marks, the court are clearly of opinion that the property in the specified 150 barrels of pork taken by the plaintiff, under his writ of replevin, had never passed from the vendors, and therefore this action cannot be maintained.

In the argument of this case on the part of the plaintiff, the case was put as a case of intermixture of goods, and it was argued that such intermixture having taken place, the plaintiff might, for that cause, hold the property as his. But, in fact, there was no such case of intermixture. The entire property was always in the defendants.

It was also urged that the defendants were estopped to deny that the 150 barrels of pork were the property of the plaintiff, having given a bill of sale of the same, and under the circumstances stated in the statement of facts. Had this been an action to recover damages for the value of 150 barrels of pork, this position might be tenable, and the defendants estopped to deny the property of the plaintiff in such 150 barrels. This would be so if an action had been brought against the defendants as bailees of 150 barrels of pork, and for not delivering the same.

But the distinction between the case of an action for damages for not delivering 150 barrels, and that of replevin, commanding the officer to take from the possession of the defendants 150 barrels, and deliver the same to plaintiff as his property, is an obvious one. To sustain the former, it is only necessary to show a right to 150 barrels generally, and not any specific 150 barrels; but to maintain replevin, the plaintiff must be the owner of some specific 150 barrels. If bought, they must be specifically set apart, or designated in some way as his, and not intermingled with a larger mass of like kind owned by the vendor.

Judgment for the defendants.

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## KIMBERLY v. PATCHIN.

(Court of Appeals of New York, 1859. 19 N. Y. 330, 75 Am. Dec. 334.)

Appeal from the Supreme Court. Action to recover the value of six thousand bushels of wheat, alleged to have been the property of the plaintiffs, and to have been converted by the defendant. Upon the trial before Mr. Justice Greene, at the Erie Circuit, it was proved that, one Dickinson had in warehouse, at Littlefort, in Wisconsin two piles of wheat, amounting to six thousand two hundred and forty-nine bushels. John Shuttleworth proposed to purchase six thousand bushels of wheat. Upon being shown the piles, he expressed a doubt whether they contained that quantity. Dickinson declared his opinion that they did, and agreed to make up the quantity if they fell short. A sale was then made at seventy cents per bushel, Dickinson signing and delivering to Shuttleworth a memorandum, as follows:

"Littlefort, February 17, 1848.

"John Shuttleworth Bought of D. O. Dickinson.

| | | |
|---|---|---|
| 6,000 bushels of wheat, delivered on board, 70 cents | | $4,200 |
| Received his draft upon John Shuttleworth, of Buffalo, for | $2,100 | |
| To remit me | 1,600 | |
| Five drafts of $100 each | 500 | |
| | | $4,200 |

"D. O. Dickinson."

He also signed and delivered to Shuttleworth this paper, viz:

"Littlefort, February 18, 1884.

"6,000 bushels wheat.

"Received in store 6,000 bushels of wheat, subject to the order of John Shuttleworth, free of all charges on board.

"D. O. Dickinson."

The wheat was left undisturbed in the warehouse. Shuttleworth sold the wheat to the defendant, assigning to him the bill of sale and warehouse receipt. Dickinson, shortly afterwards, sold the whole quantity of wheat in the two piles, to a person under whom the plaintiffs derived title. The defendant having obtained the possession of the wheat, this action was brought. The judge, under exception by the defendant, directed a verdict for the plaintiffs, which was rendered, and the judgment thereon having been affirmed at general term, in the eighth district, the defendant appealed to this court.

COMSTOCK, J.[21] Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale made by Dickinson to one Shuttleworth on the 18th of February, 1848. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of six thousand bushels of wheat, at seventy cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the six thousand bushels subject to the vendee's order; of the price $2,600 was paid down, and the residue, $1,600, which was to be paid at a future day, the purchaser afterwards offered to pay, according to the agreement. So far the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained, because the number of bushels and the price per bushel were specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

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[21] Part of the opinion is omitted.

The quantity of wheat in store to which the contract related was estimated by the parties at about six thousand bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was six thousand two hundred and forty-nine, being an excess of two hundred and forty-nine bushels. When Shuttleworth bought the six thousand bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the six thousand bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words, a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description, which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it and for another man to own the residue without a separation of the parts? To bring the inquiry to the facts of the case: In the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances could Shuttleworth become owner of six thousand bushels and Dickinson of the residue, which turned out to be two hundred and forty-nine bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of six thousand bushels and then one to D. for the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it no one could own the wheat, and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly according to their contracts. One would be entitled to six thousand bushels and the other to what remained after that quantity was subtracted.

Again suppose, Dickinson having in store and owning two hundred and forty-nine bushels, Shuttleworth had deposited with him six thousand bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property where neither would lose his title. In the law of bailments it is entirely settled that S., being the bailor of the six thousand bushels, would lose nothing by the mixture, and, it being done by consent, it is also clear that the bailee would lose nothing. Story on Bailments, § 40; 2 Bl. Com. 405.

These and other illustrations which might be suggested demonstrate the possibility of a divided ownership in the six thousand two hundred and forty-nine bushels of wheat. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question so to deal with each other as to effectuate that result. One of them being the owner of the whole, he could stipulate and agree that the other should thenceforth own six thousand bushels without a separation from the residue. And this, I think, is precisely what was done. The six thousand bushels might have been measured and delivered to the purchaser, and then the same wheat might have been re-delivered to the seller under a contract of bailment. In that case the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might, moreover, have mixed the wheat thus re-delivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass.

Now the contract of sale and of bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of re-delivery according to the bailment—resulting in the same mixture as before—most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange, indeed, if the law denied their power to do so.

There are in the books a considerable number of cases having a real or some apparent bearing upon the question under consideration. Some of them very unequivocally support the defendant's title under the sale to Shuttleworth. A few only of these will be cited. In Whitehouse v. Frost, 12 East, 614, the vendors owned forty tons of oil secured in one cistern, and they sold ten tons out of the forty, but the quantity sold was not measured or delivered. The purchaser sold the same ten tons to another person, and gave a written order on the original vendors, which, on being presented, they accepted, by writing the word "accepted" on the face of the order, and signing their names. It was held by the English Common Pleas that the title passed; considerable stress being laid on the acceptance of the order, which, it was said, placed the vendors in the relation of bailees to the quantity sold. This was in 1810.

In the following year the case of Jackson v. Anderson, 4 Taunt. 24, was decided in the King's Bench. That was an action of trover for one thousand nine hundred and sixty pieces of coin called Spanish dollars. Mr. Fielding, at Buenos Ayres remitted to Laycock & Co., at London, $4,700, and advised the plaintiffs that one thousand nine hundred and sixty of the number were designed for them in payment for goods bought of them. Laycock & Co. received the four thousand seven hundred pieces and pledged the whole of them to the defendant, who sold them to the bank of England. It was held: 1. That the letter of advice was a sufficient appropriation of $1,960 to the plaintiffs. 2. That the plaintiffs and defendant did not become joint-tenants or tenants in common of the dollars. 3. That although no specific dollars were separated from the residue for the plaintiffs, yet as the defendant had converted the whole, trover would lie for the plaintiffs' share. Of course the action in its nature directly involved the plaintiffs' title, and it was held that the sale or appropriation of a part without any separation was a perfect sale.

In Pleasants v. Pendleton, 27 Va. 473, 18 Am. Dec. 726, the sale (omitting immaterial circumstances) was of one hundred and nineteen out of one hundred and twenty-three barrels of flour, situated in a warehouse, all of the same brand and quality. It was held by the Virginia Court of Appeals, upon very elaborate consideration, and after a review of all the cases, that the title was transferred by the sale. See, also, Damon v. Osborn, 1 Pick. (Mass.) 477, 11 Am. Dec. 229; Crofoot v. Bennett, 2 N. Y. 258. In the last-mentioned, which was decided in this court, the sale was of forty-three thousand bricks in an unfinished kiln containing a larger quantity. A formal possession of the whole brick-yard was taken by the purchaser. It was held that he acquired title to the forty-three thousand, although no separation was made.

In the opinion of Judge Strong, the case was made to turn mainly on a supposed delivery of the whole quantity. But, with deference, that circumstance does not appear to me to have been the material one, inasmuch as all the bricks confessedly were not sold. The delivery, therefore, did not make the sale, and if part could not be sold without being separated I do not see how a formal delivery of the whole brick-yard could cure the difficulty. The learned judge speaks of the transaction as a delivery of the whole quantity "with the privilege of selection." But assuming, as he did, that the want of selection or separation was the precise difficulty to be overcome, it is not easy to see how a privilege to select could change the title before the selection was actually made. The case, therefore, it seems to me, can only stand on the ground that the sale was in its nature, complete; the formal delivery of the whole being doubtless a circumstance entitled to weight in arriving at the intention of the parties. The case is in short a strong authority to prove that in sales by weight, measure or count, a separation of the part sold from the mass is not in all cases a fundamental requisite.

Referring now to cases where it has been held that sales of this general nature were incomplete, it will be found that they are not essentially and necessarily opposed to the conclusion that, in the instance before us, the title was changed. In White, Assignee, etc., v. Wilks, 5 Taunt. 176, a merchant sold twenty tons of oil out of a stock consisting of different large quantities in different cisterns, and at various warehouses. The note of sale did not express the quality or kind of oil sold or the cistern or warehouse from which it was to be taken, and the purchaser did not even know where the particular oil lay, which was to satisfy the contract. Very clearly the title could not pass upon such a sale; and so it was held, although the seller was entitled by the contract to charge "1s. per ton per week rent," for keeping the oil. A very different question would have been presented if the cistern from which the twenty tons were to be taken had been specified. The mass and quality would then have been ascertained. As it was, the subject of the contract was not identified in any manner. The remarks of the judge, evidently not made with much deliberation, must be construed with reference to the particular facts of the case.

In Austen v. Craven, 4 Taunt. 644, there was a contract to sell two hundred hogsheads of sugar, to be of four different kinds and qualities, which were specified. It did not appear that the seller, at the time of the contract, had the sugar on hand, or any part of it, and the fact was assumed to be otherwise. The sale was, moreover, at so much per cwt., requiring that the sugar should be weighed in order to ascertain the price. In these circumstances the case was considered plainly distinguishable from Whitehouse v. Frost, supra, and it was held that the title did not pass. I do not see the slightest ground for questioning the decision, although, perhaps, one or two remarks of Chief Justice Mansfield are capable of a wider application than the facts of the case would justify.

The two cases last mentioned have been not unfrequently cited in various later English and American authorities, which need not be particularly referred to. Some of these authorities may suggest a doubt whether the title passes on a mere sale note by measure or weight out of a larger quantity of the same kind and quality, there being no separation and no other circumstances clearly evincing an intention to vest the title in the purchaser. It is unnecessary now to solve that doubt, because none of the decisions announce the extreme doctrine, that where, in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design.

Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms, that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us the vendor not only executed his bill of sale professing to transfer six thousand bushels of wheat, but waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold the same wheat in store as the bailee thereof for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property for the reason that it was mixed with his own. But no one will contend for such a doctrine.

I repeat it is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract and all parts are of the same value and undistinguishable from each other.

* * *

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the six thousand bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought, and it results that the plaintiff cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of six thousand and the plaintiffs of two hundred and forty-nine parts of the whole. As neither could maintain an action against the other, for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed and a new trial granted.

Gray and Grover, JJ., dissented; Strong, J., expressed himself as inclined to concur, if necessary to a decision; but, it being unnecessary, he reserved his judgment.

Judgment reversed and new trial ordered.

## ANDERSON v. CRISP.

(Supreme Court of Washington, 1892. 5 Wash. 178, 31 Pac. 638, 18 L. R. A. 419.)

Action by J. M. Anderson and another against George W. Crisp to recover possession of some brick held by defendant as constable under a levy. From a judgment for defendant, plaintiffs appeal. Affirmed.

Dunbar, J. It is contended by the appellants that the determining question in this case is whether a sale of personal property constituting part of a large mass of like property passes title to the purchaser until it is separated from the mass, or in some other way designated or distinguished; and appellants' brief on this proposition is elaborate and painstaking, and would greatly aid the court in investigating this question, did we deem its determination necessary in this cause.

The question presented by appellants is a new question in this state, and is an exceedingly important one; and in consideration of its importance, and in consideration of the fact that the authorities are so conflicting, we deem it advisable not to decide it until such decision is necessary to the determination of the cause at issue. We say this because, conceding the force of appellants' argument, this cause, we think, must be distinguished from the cases cited which sustain the rule contended for by appellants, that it is not necessary to separate or distinguish a portion of personal property from the mass which includes it, to pass title to the portion sold. All those cases are based on the supposition that all the different portions of the mass are of equal value and of uniform quality, so that there is nothing left to be done by either party but to weigh, measure, or count, which acts involve no discretion; that the intention of the parties to the contract is the only thing to be considered, and that, when it can be definitely determined from the terms of the contract that the intention of the parties was to pass the title, the title is held to pass. Or, in other words, we presume they mean to say that, while the separation from the common mass is a circumstance going to show the intention of the parties to pass the title, it is not an essential circumstance.

Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334, is the leading case supporting this rule, and has received much criticism, both favorable and adverse, by courts and text writers. There it was held, upon a sale of a specific quantity of grain, that its separation from a mass indistinguishable in quality or value, in which it is included, is not necessary to pass the title, when the intention to do so is otherwise clearly manifested. In that case it will be noticed that the goods were indistinguishable in quality or value, and it was upon that particular state of facts that the argument of the court was based. "It is," said the court, "a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to the other, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and therefore are capable of exact identification." But the court with great force proceeds to argue that other character of property, such as grains, wines, oils, etc., which are not susceptible of definite description, are not subject to this rule, but that the title to such property can be held to pass by contract without separation or manual delivery, if nothing further remains to be done in regard to it.

But it must be admitted that if all the property in the mass is not of equal value something more does remain to be done. Thus, in the case at bar, another element is injected into the contract, and there is a question of relative values to be yet determined. The appellants did not buy a portion of an indistinguishable mass, where all the component parts were of equal value; but their contract called for 162,000 merchantable brick; and the evidence was that the brick that were deemed unmerchantable were thrown aside and not counted in when they came to haul them. So that it is impossible to determine, before the segregation of the brick, not only what particular brick were sold, but what relative portions of the kiln were sold. And while, as we have said before, it may be conceded that the intention of the parties will be carried into effect, if it can be ascertained, yet under this contract it is impossible to ascertain, not only the particular brick sold, but the actual relative number of brick sold, by reason of the unsettled question of what brick were and what were not merchantable, creating an element of uncertainty in the contract which does not exist in those cases where the vendor sells a certain number of bushels of grain or a certain number of gallons of oil or tons of hay, in an undivided mass, where all the different portions are of equal value.

We think to hold that the title passed in this case would be carrying the principles of liberal construction beyond the rule laid down in any of the cases cited by appellants. It is true that some of them were brick cases, similar in most respects to the case at bar, but in none of them did it appear that the brick in the kiln were not of uniform and equal value; and all the American cases were decided on the strength of Kimberly v. Patchin, supra, and the principles upon which that case was based are thus stated by Mr. Ralston, who is an earnest advocate of what he terms "the new rule:" "When the constituent parts which make up a mass are indistinguishable from each other by any physical difference in size, shape, texture, or quality, and the quantity and general mass from which it is to be taken are specified, the subject of the contract is sufficiently ascertained, and the title will pass, if the sale is complete in all its other circumstances." Plainly, the case at bar does not fall within those principles.

This being our view of the law covering this particular case, and there being no conflict in the testimony concerning the fact that it was only merchantable brick that were sold, the appellants could not have been injured by the instruction complained of; for they would not have been entitled to a verdict, in any event.

Reaching this conclusion renders unnecessary the investigation of the other questions raised. The judgment is affirmed.

ANDERS, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

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## LAMPREY v. SARGENT.

(Supreme Court of New Hampshire, 1878. 58 N. H. 241.)

Replevin, for 15,000 hard bricks. Pleas, the general issue, and a denial of the plaintiff's title. The defendant and one Curtis were brickmakers; and August 4, 1873, being the owners of eight holes of a kiln, they made the following sale:

"Plaistow, August 4, 1873.

"This day sold to J. S. Lamprey six holes of hard brick, now on our yard on Bly land, next to the highway, estimated at eighty thousand, be the same more or less, at seven dollars per thousand:—80 M. @ $7.00 per M., $560.00. Sargent & Chase."

On the same day the plaintiff took two bricks, and in a day or two after, four thousand, from the six holes. The defendant took the 15,000 hard bricks from the six holes, in March, 1874. The evidence tended to show that a kiln contains three kinds of bricks,—hard, light red, and pale; that these kinds are suitable for different uses, are of different values, and are well known to masons, brickmakers, and dealers; that their proportions in a kiln depend upon the success in burning; that this kiln was well burnt, and the pale and light red were a small portion of the whole; that the pale were on the outside, the light-red further in, and the hard still further in; that the separation of the different kinds requires some skill and judgment; and that on the day of sale the pale had been, and the light-red had not been, separated and removed from three sides of that part of the kiln called, in the bill of sale, the six holes. The question was, whether there was a sufficient separation to pass the title to the 15,000 bricks to the plaintiff.

Bingham, J. The facts stated in the case are equivalent to a finding that the six holes of bricks, including the hard and light-red, unseparated, were constructively delivered to the plaintiff with the right to retain the possession of the whole for a reasonable time, that he might select therefrom the hard bricks, and leave the light-red for the vendors. It was an executed sale as between the parties, and passed the title to the hard bricks to the plaintiff. Page v. Carpenter, 10 N. H. 77.

In the case of a sale of a part of an entire mass of goods, such as coal, brick, flour, and grain, if the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part sold, the title to that part passes to the purchaser, and he may retain the whole until he has had a sufficient time and opportunity to separate and take the part belonging to him. Story on Sales 314, n. 3; Weld v. Cutler, 2 Gray (Mass.) 195; Damon v. Osborn, 1 Pick. (Mass.) 476, 11 Am. Dec. 229.

Judgment on the verdict.

## SECTION 6.—CONTRACT TO SELL UNASCERTAINED GOODS—APPROPRIATION

### WOODS et al. v. RUSSELL.

(Court of King's Bench, 1822. 5 Barn. & Ald. 942.)

Abbott, C. J., now delivered the judgment of the Court.

This was an action of trover for a ship, rudder, and cordage, by the assignees of Alexander Paton, a bankrupt, and the facts were shortly as follows: Paton was a ship-builder, and in October, 1818, he entered into a written contract with the defendant to build and complete a ship for the defendant, and finish and launch her in April, 1819; and the defendant was to pay for the ship by four instalments of £750. each; the first when the keel was laid, the second when they were at the light plank, and the third and fourth when the ship was launched. The payments were to be made by bills at two, four, six, and eight months. The first and second instalments were duly paid. In March, 1819, the defendant appointed a master, who from that time, superintended the building. In May, 1819, the defendant advertised the ship for charter, and on the 16th of June chartered her, with Paton's privity, for a voyage from Newcastle to Newfoundland. Before the 26th of June the ship was measured and surveyed, with Paton's privity, to the intent that the defendant might get her registered in his name. On the 19th June the master entered into the usual bond for delivering up the register; on the 25th Paton signed the usual certificate of her build, &c., and on the 26th the ship was registered in the defendant's name. On that day the defendant paid Paton the third instalment. Paton's certificate described the ship as launched, but that was not the case, and Paton's people continued working upon her, and using his timber and materials till the third of July. One of the master's apprentices was employed on board by his directions from the early part of June, and on the 30th the master ordered him to sleep on board; but on that same day Paton committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of July the defendant and a crew he had hired took possession of the ship, and his servants, by his direction, took from Paton's yard and warehouse a rudder and cordage, which Paton had bought for the ship. On the 4th of July the ship was launched. The fourth instalment was never paid. The ship was incomplete when the act of bankruptcy was committed, and the expense of launching her was borne by the defendant.

Upon these facts, the questions proposed to the consideration of the Court were, whether the plaintiffs were entitled to recover the value of the ship, in which case the value, subject to a deduction, was to be taken at £3000; or, if not, whether they were entitled to recover the value of the rudder and cordage; and should the Court be of opinion that they were entitled to neither, a nonsuit was to be entered; and upon these points alone the case was argued before the Court. It has occurred, however, to the Court, that a third question arises upon the facts, which neither party could have intended to exclude, which is this: whether, if the plaintiffs are not entitled to recover the whole value of the ship, they may not be entitled to recover to the extent of so much of the fourth instalment as, if the defendant has the ship, he ought to pay. And, upon the first and second questions, our opinion is in favour of the defendant; upon the last against him. This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other.

But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because, here, Paton signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant. The defendant had, at that time, paid half what the ship, when complete, would be worth. Paton could not be injured by having the general property in the ship considered as vested in the defendant, because he would still have a lien upon the possession for the residue of the price; and we think the legal effect of signing the certificate for the purpose of having the ship registered was, from the time the registry was complete, to vest the general property in the defendant. In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner, and when Paton concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as that oath described it to be?

The case of Macklow v. Mangles, 1 Taunt. 318, seems to us to be clearly distinguishable from the present, because the bargain there for building the barge does not appear to have stipulated for the advances which were made, and those advances do not appear to have been regulated by the progress of the work. Mr. Justice Heath's opinion appears to have been founded on the notion that the builder was not tied down to deliver that specific barge, but would have been at full liberty to have substituted any other he was building, and the builder had done no act expressing an unequivocal consent that the general property should be considered vested in the purchaser. The painting of the name upon the stern, the only act there, pledged the builder to nothing; it expressed an intention that the barge should be Pocock's, but it did no more. He might change that intention and obliterate the name. But the signing of the certificate, here, to the intent that the defendant might obtain a registry in his own name, was a consent that what was necessary to enable the defendant to obtain such registry should, as between them, be considered as complete, and that, as the defendant would have to swear that he was sole owner of the ship, the ownership should be considered his. We are, therefore, of opinion, that the assignees, who claim under Paton, are bound equally with him; and, as this is not a case within the statute of James, the plaintiffs are not entitled to recover the general value of the ship. And as to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand upon the same footing with the ship, and that, if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage, as parts thereof.

Upon the last question, however, we are of opinion against the defendant. Though the general ownership was vested in the defendant, the possession remained with Paton; and as the bills for the third and fourth instalments were to be given at the launching of the ship, (when launched,) Paton, had he completed the ship, would have had a lien upon it till those bills were given; and as the defendant thought fit to take the ship before it was complete, after having given bills for the first three instalments only, we think he ought to have given a bill for so much of the fourth instalment as, according to the value of what remained to be done, Paton was entitled to receive; and that, unless what remained to be done would be equal to the whole of the fourth instalment, his taking the ship, without giving or tendering such a bill, was a wrongful taking. We are, therefore, of opinion, that, according to the provision made in that respect in the case, it ought to be referred to Mr. Bainbridge and Mr. Clayton, and such third person as they shall appoint, to take an account of the want of materials stipulated to be provided by Paton not on board, and the fair expense of launching, and to enter the verdict accordingly. If the want of materials, and the expense of launching shall amount to £750, the verdict to be entered for the defendant; if it shall amount to less than £750, a verdict for the difference to be entered for the plaintiff.

Judgment accordingly.[22]

## JOHNSON v. HUNT.

(Supreme Court of New York, 1834. 11 Wend. 135.)

This was an action of replevin, tried at the Albany circuit in September, 1831, before the Hon. James Vanderpoel, one of the circuit judges.

On the 21st August, 1829, a contract was entered into by which the defendant agreed to build a house for the plaintiff, finding the materials for the wood work and doing the work, and engaging to complete the job by the 1st May, 1830. The plaintiff, on his part, engaged to pay for the same $1525, in manner following: when the timber should be delivered on the ground for framing, $100; when the frame should be raised, $200; on the first of December, $150; the like sum on the first day of each of the four succeeding months, "provided the work shall advance according to the payments made;" making $1050 to be paid by the first day of April, and the remainder, viz. $475, when the house shall be finished. After the house was enclosed, the defendant worked plank belonging to him into eight columns for piazzas, one half of which were intended for the house building for the plaintiff, and the other half for a house which the defendant was then building for a Mr. Earl. These columns were worked in the house building for the plaintiff, and to make room for the masons to do their work, the columns were removed to the store of a Mr. Burrows. The defendant also procured and deposited in the same store four carved capitals and three bases for the columns, and six carved window and door caps. After a barn was enclosed, which the defendant was building for the plaintiff on the same lot on which the house was erected, the columns and other materials were removed thereto, and subsequently four of the columns were taken therefrom and used in the erection of Earl's house. The other columns and the carved work remained in the barn until June or July, 1830, when the defendant broke open the barn and took and carried them away. For this property the action was brought.

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[22] See Wood v. Bell, 5 E. & B. 772 (1856).

The plaintiff proved payments made by him to the defendant, to the amount of $1700, and that the defendant, about two weeks previous to taking the property from the barn, abandoned the job he had undertaken, saying he would not work any more at it, unless the plaintiff would pay him more money. It was proved on the part of the defendant, in pursuance of a notice attached to his plea, that on the 5th May, 1830, while the property in question remained in the store of Burrows, it was levied upon by a deputy of the sheriff of Albany, by virtue of an execution against the defendant for the sum of $556, who left the same in the possession of the defendant. The value of the property was testified to. The judge ruled that the plank from which the columns were worked, though purchased by the defendant, became the property of the plaintiff when the same were delivered upon the plaintiff's lot; and though the lumber used in preparing the columns in question had not been separated from that used in preparing the columns for Earl's house at the time of the levy, yet that it was subsequently separated, and that it was reasonable to presume that the defendant intended it for the house of the plaintiff; and as to the carved work, that though it had been delivered upon the premises of the plaintiff at the time of the levy, still it had been procured for the plaintiff's house, and immediately upon its being so procured, and before a delivery upon the premises of the plaintiff, it became the property of the plaintiff. To which decision the defendant excepted. The jury, under the charge of the judge, found a verdict for the plaintiff, which the defendant now moved to set aside.

Savage, C. J. By the contract, the defendant was to procure the materials and build the house for the plaintiff. The materials were purchased by the defendant, were his own, and at his risk. The fact that such materials were intended for the plaintiff's house did not change the property. Had the defendant acted as the plaintiff's agent in purchasing the materials, then indeed the property would have been the plaintiff's. The contract, however, does not give countenance to any such idea, nor was such a construction contended for. The judge at the circuit held that the property was vested in the plaintiff by the act of the defendant in purchasing it, intending to work it into the plaintiff's house. In this the judge certainly erred. When the defendant purchased the property, it became his own; he might sell it again, and purchase other materials to use in the plaintiff's house, and if he procured such as the contract required, the plaintiff could not complain. Suppose he had purchased plank which were rotten and totally unfit for the use, but still intending them for the plaintiff's house, the plaintiff would not be bound to receive them. Or suppose the plank were purchased in Troy or Albany, or at the mill where manufactured, and before they were removed a fire had destroyed them, would the plaintiff say the loss was his? If the property was ever in the defendant, when was it changed? As personal property, clearly it did not pass until delivery, and there is no evidence in the case of a delivery by the defendant, or the receipt of it by the plaintiff. It was not intended by the contract that it should pass as personal property; it was to become the property of the plaintiff when it was worked into his house and not before.

The mere act of bringing the plank upon the plaintiff's lot, for the purpose of working it into columns, did not change the property; nor did the act of working the plank into pieces to put up have that effect, for we see the same defendant, at the same time and place, working up other plank of the same lot into materials for columns for Earl's house. If the act of working the plank in the plaintiff's house made them his property, then he owned the whole; but that is not pretended. If the working them with intent to put them up in the plaintiff's house made them his, then the intent changed the property, without any act by either of the contracting parties. That would be a very unsafe rule of property. The property of one man does not become the property of another, unless by some act indicating a delivery by one and an acceptance by the other. Had the property in question been burned when in Burrows' store, and had the defendant been perfectly solvent, I presume the plaintiff would not have considered the loss his own; surely the law would not so have adjudged it. Where any thing remains to be done by the vendor before the article is to be delivered, the right of property does not pass. Ward v. Shaw, 7 Wend. 406, and cases there cited. Here the columns were to be put together and erected before they became the plaintiff's.

In the case of Mucklow v. Mangles, 1 Taunt. 319, a boat builder contracted to build a barge for one Pocock, and received payment in advance. He finished the barge and painted Pocock's name on the stern; but before delivery, it was levied on by the sheriff, under an execution against the boat builder. It was held that the property had not passed to Pocock. Heath, J., says it comes within the cases which have been held to be executory. He adds: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another; yet the person giving the order could not bring trover."

The case of Merritt v. Johnson, 7 Johns. 473, 5 Am. Dec. 289, was a stronger case than Mucklow v. Mangles. One Travis agreed to build a sloop for E. Merritt, and to furnish the timber for the same. Travis partly finished the sloop, furnishing the greater part of the materials; but D. Merritt, the plaintiff to whom the contract was assigned by E. Merritt, also furnished part of the materials and advanced money to Travis on the contract. When the vessel was about one third finished, it was levied on under an execution against Travis. The plaintiff brought an action of trover for the vessel, but the court said that his right of action rested on the contract with Travis, and that the sloop did not become his until finished and delivered. The court take notice of the fact that the sloop was built upon ground hired by Travis; but had the fact been different, I do not see how the result would have been varied under the contract in that case, by which Merritt was to pay as the work progressed, leaving one third to be paid when the whole of the work was finished.

In this case there could not be a formal delivery of the house after it was finished; the house, standing on the plaintiff's ground, became his as fast as the parts added to it became attached, so as to become part of the freehold, but with that difference, the case of the sloop is not distinguishable in principle. The sloop was personal property, and therefore the property was not changed until delivery. The house in question was real property, but the materials of which it was composed were personal property, and did not pass to the plaintiff until delivery, or until they became affixed to the freehold; at the time of the levy, they were the property of Hunt, the defendant. The plaintiff therefore had no title, and could not recover upon the evidence before the court.

New trial granted; costs to abide the event.

## ANDREWS et al. v. DURANT et al.

(Court of Appeals of New York, 1854. 11 N. Y. 35, 62 Am. Dec. 55.)

Appeal from a judgment of the general term of the supreme court held in Albany county. The plaintiffs brought an action in the nature of trover for a barge in an unfinished state, which they alleged the defendants had converted to their own use. The defendants denied the allegations in the complaint, and set up title to the barge in themselves. The cause was tried before the Hon. M. Watson, a justice of the supreme court, in April, 1850, without a jury. The following facts appeared on the trial:

On the 24th April, 1849, the defendants entered into a contract, in writing, with William H. Bridger & Co., ship-builders, by which the latter agreed "to build" for the defendants, for the sum of $5000, a barge of certain dimensions and with a certain size and description of timbers, &c. which were particularly specified, except the rail, which was to be "according to direction of superintendent." The further provisions of the contract were as follows:

"All the materials to be furnished by the builder, and all to be of the first quality, and the work subject to the superintendent, who shall have the privilege of rejecting any timber he may think is not suitable, and object to any work not done in a workmanlike manner. The model of the boat to be made like barge I. L. Brown. The boat to be furnished complete, and ready for the ship chandler according to the above specification on the first day of August next, and delivered to Durant, Lathrop & Co. [the defendants] at Kingston. In case the barge is not complete by the time specified above, or within ten days of that time, W. H. Bridger & Co. agree to forfeit two hundred and fifty dollars for every week's delay. Payment: The said five thousand dollars to be paid as follows, viz., one thousand dollars when keel is laid—one thousand dollars when frame is up—one thousand dollars when planked and calked, and two thousand dollars when completed and delivered."

Bridger & Co. proceeded in the construction of the barge until the 4th day of August, 1849, when, having stopped payment, they assigned the unfinished vessel with their other property, to the plaintiffs as trustees for the benefit of their creditors, according to certain classes of preference. The barge had been so far advanced in its construction as to be planked, and the defendants had paid the builders three thousand dollars according to the contract, that is to say, one thousand dollars at each of the three separate stages of the work first referred to in the contract, when the builders failed. The defendants having obtained possession of the barge, proposed to the plaintiffs to finish it, and offered in that event to pay them the balance of the contract price, but this was declined; and the plaintiffs demanded the barge of the defendants, who would not give it up. The defendants then procured it to be completed on their own account, at an expense of seven hundred dollars. The person who acted as superintendent in the building of the barge was sworn, and testified that he was employed exclusively by the defendants and was paid by them.

Judgment was rendered by Justice Watson in favor of the defendants, and the plaintiffs excepted; it was affirmed at the general term. The plaintiffs appealed to this court.

Denio, J. In general a contract for the building of a vessel or other thing not yet in esse does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery and approved by such party. All the authorities agree in this. Towers v. Osborne, 1 Stra. 506; Mucklow v. Mangles, 1 Taunt. 318; Johnson v. Hunt, 11 Wend. 139; Crookshank v. Burrell, 18 Johns. 58, 9 Am. Dec. 187; Sewall v. Fitch, 8 Cow. 215; Mixer v. Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256. And the law is the same though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly. In Mucklow v. Mangles, which arose out of a contract for building a barge, the whole price was paid in advance, the vessel was built and the name of the person who contracted for it was painted on the stern, yet it was held that the title remained in the builder. In Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289, where a sloop was agreed to be built and one-third of the price was to be paid when one-third of the work was done, two-thirds when two-thirds were done, and the balance when it was completed, and before it was finished it was sold on execution against the builder after more than a third had been done and more than that proportion of the price had been paid, the court decided that the vessel was the property of the builder and not of the person who engaged it to be constructed.

Where, during the course of the transaction, the vessel or other thing agreed to be built is identified and appropriated so that the mechanic would be bound to complete and deliver that particular thing, and could not, without violating his contract, substitute another similar article though otherwise corresponding with the agreement, there would seem to be more reason for holding that the property was transferred; still it has never been held that this was enough to pass the title. In Laidler v. Burlinson, 2 Mees. & Wels. 602, the vessel was about one-third built when the contract was made. The builder and owners agreed to finish that particular vessel in a manner specially agreed upon for a price which was the equivalent for the finished vessel. Before it was completed the builder became bankrupt, and the possession passed into the hands of his assignee. The Court of Exchequer held the true construction of the contract to be that the title was to pass when the ship was completed and not before. The parties only agreed to buy a particular ship when complete, and although the builder could not comply with the contract by delivering another ship, still it was considered an executory contract merely. In Atkinson v. Bell, 8 Barn. & Cress. 277, the same principle was held in respect to a contract for making spinning machinery, and in Clarke v. Spence, 4 Adol. & Ellis, 448, which is the case principally relied on by the defendants, it was admitted by the court that the appropriation of the particular ship to the contract then in question, by the approval of the materials and labor by the superintendent, did not, of itself, vest the property in the purchaser until the whole thing contracted for had been completed.

In the case before us, it cannot be denied but that the barge, as fast as its several parts were finished with the approval of the superintendent, became specifically appropriated to the fulfilment of this contract, so that Bridger & Co. could not have fulfilled their agreement with the defendants in any other way than by completing and delivering that identical boat. This results from the consideration that the superintendent could not be called upon to inspect and approve of the work and materials of another barge, after having performed that duty as to one; so that the contract would be broken up unless it applied itself to this vessel. But it is clear that this circumstance alone does not operate to transfer the title. The precise question in this case is whether the concurrence of both particulars—the payment of parts of the price at specified stages of the work, and the intervention of a superintendent to inspect and approve of the work and materials—produces a result which neither of them separately would effect. It is no doubt competent for the parties to agree when and upon what conditions the property in the subject of such a contract shall vest in the prospective owner. The present question is, therefore, simply one of construction. The inquiry is whether the parties intended by the provisions which they have inserted in their contract, that as soon as the first payment had become payable and had been paid, the property in the unfinished barge should vest in the defendants, so that thereafter it should be at their risk as to casualties, and be liable for their debts, and passed to their representatives in case of their death. Such an agreement would be lawful if made, and the doubt only is whether the parties have so contracted.

The courts in England, under contracts in all material respects like this have held that the title passed. In Woods v. Russell, 5 Barn. & Ald. 942, the question came before the Court of King's Bench, and Abbott, C. J., distinctly declared his opinion that the payment of the installments under such a contract vested the property in the ship in the party for whom it was to have been constructed. But there was another feature in the case upon which it was finally decided. The builder had signed a certificate for the purpose of enabling the other party to procure the vessel to be registered in his name and it was so registered accordingly while it was yet unfinished and before the question arose. The court held that the legal effect of signing the certificate for the purpose of procuring the registry was, from the time the registry was complete, to vest the general property in the party contracting to have the ship built. This case was decided in 1822, and was the first announcement of the principle upon which the defendant's counsel rely in the English courts.

The case of Clarke v. Spence was decided in 1836. It arose out of a contract for building a vessel, which contained both the features of superintendence and of payments according to specific stages of the work, as in Woods v. Russell, and as in the contract now before the court. The Court of King's Bench was clearly of opinion that as fast as the different parts of the vessel were approved and added to the fabric they became appropriated to the purchaser by way of contract, and that when the last of them were so added and the vessel was thereby completed it vested in the purchaser. The court conceded that by the general rules of law, until the last of the necessary materials was added the thing contracted for was not in existence; and they said they had not been able to find any authority for holding that while the article did not exist as a whole and was incomplete, the general property in such parts of it as had been from time to time constructed should vest in the purchaser, except what was said in the case of Woods v. Russell; and that was admitted to be a dictum merely, and not the point on which the case was decided. The court, however, decided upon the authority of that case, though with some hesitation, as they said, that the rights of the parties in the case before it, after the making of the first payment, were the same as if so much of the vessel as was then constructed had originally belonged to the party contracting for its construction and had been delivered by him to the builder to be added to and finished; and they said it would follow that every plank and article subsequently added would, as added, become the property of the party contracting with the builder.

The dictum in Woods v. Russell was incidentally referred to as the law in Atkinson v. Bell, 8 Barn. & Cress. 277, and the doctrine there stated, and confirmed in Clarke v. Spence, was assumed to be correct in Laidler v. Burlinson before referred to. It has also been generally adopted by systematic writers in treatises published or revised since the decision of Clarke v. Spence, that case and Woods v. Russell being always referred to as the authority on which it rests. Story on Sales, §§ 315, 316; Chit. on Cont. 378, 379; Abbott on Shipping, 4, 5.

It is scarcely necessary to say that the English cases since the Revolution are not regarded as authority in our courts. Upon disputed doctrines of the common law they are entitled to respectful consideration; but where the question relates to the construction or effect of a written contract they have no greater weight than may be due to the reasons given in their support. Can it then be fairly collected from the provisions of this contract, that the title to the unfinished barge was to be transferred from the builder to the other party upon the making of the first payment, contrary to the principle well settled and generally understood, that a contract for the construction of an article not in existence is executory until the thing is finished and ready for delivery?

In the first place I should say that so marked a circumstance would be stated in words of unequivocal import; and would not be left to rest upon construction, if a change of property was really intended. The provision for superintendence by the agent of the intended owner, though it serves to identify and appropriate the article as soon as its construction is commenced, does not, as we have seen, work any change of property. Such would not ordinarily be the intention to be deduced from such a circumstance. Many of the materials of which a vessel is composed are ultimately covered so as to be concealed from the eye when it is finished; and as the safety of life and property is concerned in the soundness and strength of these materials, it is but a reasonable precaution to be taken by one who engages a vessel to be constructed, to ascertain as the work progresses that every thing is staunch and durable; and such a provision, as it seems to me, does not tend to show a design that there shall be a change of property as fast as any materials or work are inspected and approved. It amounts only to an agreement that when the whole is completed the party will receive it in fulfilment of the contract. The provision for advances at particular stages of the work is a very usual one where an expensive undertaking is contracted for, and it only shows that the party advancing is willing thus to assist the artisan, provided that he can see that the work is going on in good faith, so as to afford a reasonable prospect that he will realize the avails of his expenditure in a reasonable period.

The argument for the defendants would be somewhat stronger if we could say that the amount to be advanced at the several stages mentioned was understood by the parties to be the price or equivalent for the labor and materials already expended. This by no means appears, but on the contrary there is strong reason to believe that, in this case, a considerable portion of the price was to be at all times kept back, in order to secure the speedy completion of the contract. When Bridger & Co. failed only $3,000 of the $5,000 had been paid, and they would not be entitled to any more until the barge was finished, and yet it cost only $700 to complete it. This renders it improbable that the parties could have intended the sale and purchase of so much as was done at the several stages of the work at which payments were to be made, if indeed such a contract were not in itself so much out of the course of the ordinary conduct of parties as not to be assumed without unequivocal language.

The decision in Clarke v. Spence is placed very much upon the idea that parties may have contracted in reference to the doctrine announced in Woods v. Russell. That argument can have no force here, but on the contrary the inference to be drawn from our own cases and particularly from Merritt v. Johnson would be, that the title remained in the builder under such a contract until the completion of the vessel.

The foregoing considerations have led me to the conclusion that the modern English rule is not founded upon sufficient reasons, and that it ought not to be followed. The judgment of the Supreme Court should, therefore, be reversed and a new trial ordered.

Judgment reversed and new trial ordered.[23]

## ATKINSON et al. v. BELL et al.

(Court of King's Bench, 1828. 8 Barn. & C. 277.)

Assumpsit for goods sold and delivered, goods bargained and sold, work and labor, and materials found and provided. At the trial, before Hullock, B., at the Summer assizes for Lancaster, 1827, it appeared that the defendants were linen and thread manufacturers at Whitehaven, in Cumberland. The bankrupt Sleddon, before his bankruptcy, was a machine-maker residing at Preston, in Lancashire. One Kay, of Preston, obtained a patent for a new mode of spinning flax, and the defendants being desirous of trying the effect of it, on the 12th November, 1825, by letter ordered him to procure to be made for them as soon as possible a preparing frame and two spinning frames, in the manner he most approved of. In January, 1826, Kay ordered two spinning frames and a roving frame to be made by Sleddon for the defendants, and informed them that he had so done. These machines were formed on Kay's first plan, and completed at the end of March, and after they had been so completed they lay in Sleddon's premises a month, while two other machines of these defendants, intended to be used in the same mills, were altered by Sleddon, under Kay's superintendence; and when those had been completed to his mind, he ordered the machines in question to be altered in the same manner. They were altered accordingly, packed in boxes by Kay's direction, and remained on Sleddon's premises. On the 23d of June, 1826, Sleddon wrote to the defendants, and informed them that the two frames had been ready for the last three weeks, and begged to know by what conveyance they were to be sent.

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[23] A concurring opinion was delivered by Parker, J.

On the 8th of August, a commission of bankrupt issued against Sleddon, under which he was duly declared a bankrupt. The assignees afterwards required the defendants to take the frames, but they refused to do so. It was objected on the part of the defendants, that the action was not maintainable for goods bargained and sold, because the property in the frames had never vested in the defendants. The learned Judge was of opinion that the action was not maintainable, and he directed a nonsuit to be entered, with liberty to the plaintiffs to move to enter a verdict for the price of the machines. A rule nisi having been obtained for that purpose.

Bayley, J. I think the rule for entering a verdict for the plaintiff ought to be discharged. If the declaration had contained a count for not accepting the machines, the plaintiffs might have been entitled to recover; and I think now that, upon payment of costs, they should be allowed to set aside the nonsuit, and add other counts to the declaration, and have a new trial. But I cannot say that the property passed to the defendants, so as to enable the plaintiffs to recover on the counts for goods bargained and sold, or for work and labor. It is said that there was an appropriation of these specific machines by the maker, and that the property thereby vested in the defendants. I think it did not pass. Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered. It is true that Kay saw these things while they were in progress, and knew that the bankrupt intended them for the defendants; yet they might afterwards have been delivered to a third person. This case is not affected by the argument that these are patent articles, because they might have been delivered to a third person with Kay's assent.

The case of Woods v. Russell, 5 B. & A. 942, is distinguishable. The foundation of that decision was, that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made. Besides, there the ship-builder had signed the certificate to enable the purchaser to have the ship registered in his name; the legal effect of which was held to be to vest the general property in the purchaser. If in this case an execution had issued against Sleddon, the sheriff might have seized the machines. They were Sleddon's goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within Rohde v. Thwaites, 6 B. & C. 388, and there would have been a complete appropriation vesting the property in the defendants. But there was not any such assent to the appropriation made by the bankrupt, and therefore no action for goods bargained and sold was maintainable.

Then as to the counts for work and labor, if you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request, on your materials, he may maintain an action against you for work and labor. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work and labor, because his labor was bestowed on his own materials, and for himself, and not for the person who employed him. I think, that in this case the plaintiff cannot recover on the count for work and labor.

Littledale, J. I am of the same opinion. Goods bargained and sold will not lie unless there be a sale. There could not be any sale in this case, unless there was an assent by the defendants to take the articles. Here there was no assent. The property must be changed, to make the action maintainable. If the property had been changed, the maker could not have delivered these machines to any one but the defendants. I think, however, he might have delivered them to another, notwithstanding any thing that passed, and that the defendants could not have maintained trover against the party to whom they were delivered. In the case of an execution or a bankruptcy, these machines must have been treated as the goods of the maker. As to the count for work and labor and materials, the labor was bestowed, and the materials were found, for the purpose of ultimately effecting a sale, and if that purpose was never completed, the contract was not executed, and then work and labor will not lie. The work and labor and materials were for the benefit of the machine-maker, and not for the defendants.

Rule absolute, on payment of costs.[24]

## JENNER v. SMITH.

(Court of Common Pleas, 1869. L. R. 4 C. P. 270.)

Action for goods bargained and sold and goods sold and delivered. Pleas: Never indebted, payment, and payment of 8s. 2d. into court. Replication, taking issue, and damages ultra.

The cause was tried before Brett, J., at the sittings at Westminster after last Michaelmas Term. The facts were as follows: On the 14th of October, 1867, the plaintiff, who is a hop-merchant in London, met the defendant, a maltster of Devizes, at Weyhill Fair, Hants. The defendant wished to buy of the plaintiff four pockets of Carpenter's Sussex hops which the plaintiff had there; but, as the plaintiff had already sold two of them, he proposed to sell the defendant in lieu of them two pockets of Thorpe's of which he shewed him a sample, offering to let the defendant have the two pockets of Carpenter's at £9. per cwt. (the price of that day's fair being £9. 9s.), if he would take two pockets of Thorpe's at £7. 15s. per cwt. The plaintiff at the same time or shortly after informed the defendant that the last-mentioned two pockets were lying at Prid & Son's Warehouse, Kentish Buildings, Southwark, and agreed that he should have them upon the same terms as if they had been in bulk at the fair, that is, that he should be at no expense for warehousing or carriage. The defendant consented to purchase the four pockets upon these terms, and took away with him the two pockets of Carpenter's, but requested that the two pockets of Thorpe's should not be sent until he wrote for them.

The plaintiff had at this time three pockets of Thorpe's hops at the warehouse of Prid & Son. On the 21st of October, the plaintiff's son went to the warehouse, and instructed the warehouseman to set apart two of the three pockets of Thorpe's for the defendant; and the warehouseman thereupon placed on two of them, numbered respectively 1 and 3, what is called a "wait order card," that is, a card upon which was written, "To wait orders," and the name of the vendee. No alteration, however, was made in the warehouse books; and the plaintiff, the original depositor, still remained liable for the rent.

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[24] A concurring opinion was delivered by Holroyd, J.
For a criticism of this case, see Benjamin, Sales (5th Eng. Ed.) p. 360.

On the 4th of November, the plaintiff sent the defendant an invoice, as follows, at the same time inclosing a draft for acceptance:

"Mr. S. Smith, Bought of Charles Jenner.

| | |
|---|---|
| 2 pockets Sussex hops (Carpenter, 1867). | |
| No. 2.... 1 cwt. 2 qrs. 26 lbs. | |
| 4.... 1 cwt. 2 qrs. 13 lbs. | |
| 3 cwt. 1 qr. 11 lbs. at £9. per cwt. | £30. 2. 8 |
| 2 pockets Sussex hops (Thorpe, 1867). | |
| No. 1.... 1 cwt. 2 qrs. 27 lbs. | |
| 3.... 1 cwt. 0 qr. 21 lbs. | |
| 2 cwt. 3qrs. 20 lbs. at £7. 15s. per cwt. | 22.13.10 |
| | £52.16. 6 |

"The two last pockets of hops are lying to your order."

On the 8th of November the defendant wrote to the plaintiff, as follows:

"Sir: I have returned your bill unsigned; but, as I have never received the two pockets of hops or heard anything about them, I concluded you had not thought of sending them, and have made an exchange for some malt, and shall not require them. As I will never sign a bill, I will pay, as was agreed, in February, the weight of the two Carpenter's."

The defendant subsequently paid the price of the two pockets which he had received, all but a small balance which was covered by the payment into Court.

It was objected on the part of the defendant that, as to the two pockets of Thorpe's hops, there was no contract binding within the Statute of Frauds, no delivery or acceptance, or part payment, and no evidence of goods bargained and sold.

For the plaintiff it was insisted that the whole was one bargain, and consequently that there had been a part delivery and part payment, and that the property in the whole four pockets passed by the contract.

The learned judge ruled that it was one entire contract, and that, therefore, there had been a part delivery so as to make a contract binding within the Statute of Frauds; that the plaintiff could not rely upon the part payment, because the defendant, at the time of making the payment, repudiated the bargain as to the two pockets in question; that, though there was a binding contract, the property did not pass thereby, inasmuch as the contract was to deliver two out of a larger number of pockets of Thorpe's hops equal to sample, the price to be determined according to the weight; and that there had been no sufficient appropriation afterwards to pass the property, because

Prid & Son never bound themselves to hold for the defendant instead of for the plaintiff. He thereupon nonsuited the plaintiff, reserving him leave to move to enter a verdict for £22. 13s. 10d., the Court to draw inferences of fact.

Brett, J. At the trial I proposed to nonsuit the plaintiff, on the ground that there was no evidence to go to the jury in support of the count for goods bargained and sold. It was not then suggested that there was any authority from the defendant to the plaintiff to select the two pockets for him. If it had been, I should not have nonsuited the plaintiff, but would have left that question to the jury. The question now is, not whether there was any evidence for the jury, but whether the Court can infer from the facts proved, that the property in the two pockets of Thorpe's passed. It is clear that no property passed by the contract itself. The contract was for a sale by sample of unascertained hops, the price depending on the weight. Then comes the case put by my Brother Blackburn in the passage at page 127, to which I referred in the course of the argument. Here, there was no previous authority given to the plaintiff to appropriate; and, if not, what evidence was there to show that the appropriation of the two pockets in Prid & Son's warehouse was ever assented to by the defendant? The defendant's assent might have been given in either of two ways,—by himself, or by an authorized agent. By himself, after the receipt of the letter containing the invoice; or by the warehouse-keepers, if there had been any evidence of agency or authority in them to accept, and assent by them to hold the hops for him. I think the defendant's letter refusing to accept the draft was strong, if not conclusive, to shew that there had been no such assent by the defendant. And, as to Prid & Sons, the evidence fails on both points. They never agreed to hold the two pockets on behalf of the purchaser; and, if they did, there is no evidence of any authority from him that they might do so. Mr. Lloyd has strongly put forward a point which was not made at the trial, viz. that there was evidence that, by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him, If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for, he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to shew that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed; consequently, the plaintiff cannot recover as for goods bargained and sold.

Rule discharged.[25]

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[25] A concurring opinion was delivered by Keating, J.

## ANDREWS v. CHENEY.

(Supreme Court of New Hampshire, 1882. 62 N. H. 404.)

Assumpsit, to recover money paid for goods. Facts found by a referee. October 28, 1879, the plaintiff bought goods of the defendant and paid for them. The defendant did not have in stock the goods wanted, and the plaintiff selected the kind and quality desired from samples. The defendant agreed to have the goods at his store within two weeks, at which time the plaintiff was to call for them; if they were ready before that time the defendant agreed to notify him. Within the stipulated time the defendant got the goods into his store, set them apart by themselves, and marked them with the plaintiff's name. The goods, together with the store, were destroyed by fire November 21, 1879, the plaintiff not having called for them. The court ordered judgment for the defendant, and the plaintiff excepted.

Carpenter, J. The property in the goods did not pass to the plaintiff by virtue of the contract, for they were not then ascertained, and may not have been in existence. The agreement on the part of the defendant was executory. He agreed to furnish goods corresponding to the samples selected by the plaintiff. If the goods, subsequently procured and set apart by the defendant, did not conform to the samples, the plaintiff had a right to reject them. It does not appear that he waived that right. The defendant was not concluded by his selection; he might have sold or otherwise disposed of the particular articles set apart by him, and substituted others in their place. A contract of sale is not complete until the specific goods upon which it is to operate are agreed upon. Until that is done the contract is not a sale, but an agreement to sell goods of a particular description. It is performed on the part of the vendor by furnishing goods which answer the description. If, as in the case of a sale by sample, the specific goods are not ascertained by the agreement, the property does not pass until an appropriation of specific goods to the contract is made with the assent of both parties. Bog Lead Mining Co. v. Montague, 10 C. B. N. S. 489; Jenner v. Smith, L. R. 4 C. P. 270; Heilbutt v. Hickson, L. R. 7 C. P. 438; Merchants' N. Bank v. Bangs, 102 Mass. 291; Black. Sales, 122, 127; Benj. Sales, § 358. If the plaintiff authorized the defendant to make the selection, the property immediately on the selection vested in the plaintiff. Aldridge v. Johnson, 7 E. & B. 885. It not appearing that the plaintiff gave such authority, the goods at the time of the fire were the property of the defendant, and their destruction was his loss.

By the terms of the contract the defendant was to have the goods at his store within two weeks, at the end of which time, or sooner if notified that they were ready, the plaintiff was to call for them, and the defendant was to deliver them. Within the stipulated time the defendant procured the goods and had them ready for delivery. This was all the agreement required him to do, and all that he could do until the plaintiff came for them. The plaintiff's call being a condition precedent to the defendant's obligation to deliver, must be shown in order to entitle the plaintiff to treat the contract as rescinded and recover back the purchase-money.

It may be that the trial before the referee proceeded upon the mistaken theory that the rights of the parties were concluded by the destruction by fire of the particular goods selected by the defendant, and that the only question was upon whom the loss of those goods should fall. The plaintiff did not call for the goods before the fire; but whether he did after the fire does not appear, and may have been considered immaterial. The rights of the parties under the agreement were not affected by the destruction of the goods. If they were set apart without authority from the plaintiff, he still had the right to call for the goods he bargained for, and the defendant was bound to deliver them. Upon the defendant's neglect or refusal to deliver them upon request as well after as before the fire, the plaintiff might at his election rescind the contract and recover the purchase-money, or affirm it and recover for the breach. Drew v. Claggett, 39 N. H. 431; Weeks v. Robie, 42 N. H. 316; Swazey v. Company, 48 N. H. 200.

The case may be recommitted to the referee, if the plaintiff desires it, for the purpose of showing a call for the goods after the fire. If recommitted, it will be open to the defendant to show that he was authorized by the plaintiff to select the goods. As the case stands the exceptions are overruled.

Exceptions overruled.

ALLEN, J., did not sit: the others concurred.

## MITCHELL et al. v. LE CLAIR.

(Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 308, 43 N. E. 117.)

Contract, upon an account annexed, to recover the price of sixty tubs of butter sold by the plaintiffs to the defendant. Trial in the Superior Court, without a jury, before Richardson, J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs are wholesale butter dealers in Boston and the defendant is a grocer in Southbridge.

On September 26, 1893, the defendant visited the store of the plaintiffs, inquiring the price of butter. The plaintiffs offered to sell to the defendant sixty tubs of butter, of the same kind and quality as that previously bought by the defendant from the plaintiffs, for twenty-seven cents per pound, cash, provided he accepted before twelve o'clock on the following day. The defendant before twelve o'clock on the following day, by telegram, accepted the offer. The plaintiffs testified that, immediately upon the acceptance of the offer, they went to the public storage warehouse, where they had large quantities of butter stored, and picked out sixty tubs of butter, weighed it, set it one side, and marked each tub for the purpose of designating it as the butter of the defendant, and at once sent a bill of all of it to the defendant, marked "Cash on demand." The defendant had no notice whatever of this selection, setting aside, and marking of sixty tubs of butter, except the receipt of the bill. There was no evidence introduced to show that the kind or quality of the butter thus set aside was or was not of a similar grade or quality as that sold the defendant before. No objection was ever made by the defendant to paying for any of it on the ground that it was not of the quality or kind of butter purchased. Afterwards, the defendant at different times directed shipments to be made by the plaintiffs of the butter so bought by him, and the same was shipped, to the amount of forty tubs, and accepted without any objection, and paid for. The plaintiffs testified that these forty tubs were taken from the lot set aside as above stated; but of this fact the defendant had no knowledge, except from the bill sent at the time of purchase, which enumerated the separate weight and tare of each tub of butter.

In March, 1894, the defendant directed the plaintiffs to ship to him the remaining twenty tubs of butter. This the plaintiffs refused to do until they had first received the pay for them, claiming that the sale was for cash on demand, and demands for payment having been previously made. The defendant did not understand these to be the terms; but did understand that he was to receive delivery of the butter and pay for it during the three months succeeding September 26, 1893. The price of butter declined in the market soon after the agreement was made. The plaintiffs still have the butter on storage, subject to the order of the defendant when he pays for it. The defendant asked the judge to rule "that the selection, setting aside, and marking of the sixty tubs, as testified to by the plaintiffs, could not be considered a delivery, the defendant neither having knowledge of such action nor assenting thereto, expressly or by implication," and "that the plaintiffs had failed to make out their case, in that there was no evidence that the butter selected, set aside, and marked, as aforesaid, was of the kind and quality ordered."

The judge refused to rule as requested; found, that, by the agreement, the defendant was to take all the sixty tubs, and pay for it within three months from September 26, 1893; and that the plaintiffs made several demands upon the defendant, before and after the expiration of the three months, to take the rest of the butter and pay for it; and found for the plaintiffs. The defendant alleged exceptions.

Knowlton, J. The principal question in this case is whether there was a sufficient delivery of the butter to pass the title as between the parties. There is no dispute that there was a good contract of sale, and no question arises under the statute of frauds.

The defendant accepted by telegram the plaintiffs' offer to sell him 60 tubs of butter of a specified quality at 27 cents per pound. The plaintiffs had in their storehouse a large quantity of butter. Upon the receipt of the defendant's telegram accepting their offer, they were impliedly authorized, as the defendant's agents, to set apart and appropriate to him the goods called for by the contract. This they immediately did, weighing the butter, setting it apart, and marking each tub for the purpose of designating it as the defendant's property. They then at once sent him a bill of all of it, marked, "Cash on demand." This completed the sale, and passed the title. Morse v. Sherman, 106 Mass. 430; Marble v. Moore, 102 Mass. 443; Arnold v. Delano, 4 Cush. 33–38, 50 Am. Dec. 754; Ropes v. Lane, 9 Allen, 502–510; Bank v. Bangs, 102 Mass. 291–295; Safford v. McDonough, 120 Mass. 290; Gilmour v. Supple, 11 Moore, P. C. 551–556; Tarling v. Baxter, 6 Barn. & C. 360; Benj. Sales (6th Am. Ed.) 294–298, and cases cited in the note.

If the contract is not in such form as to be binding under the statute of frauds, such an appropriation does not constitute an acceptance under that statute, nor does it change the possession, and thereby deprive the vendor of his lien for the price. Safford v. McDonough, 120 Mass. 290. But if the vendee in such a case afterwards refuses to take the goods, and pay for them, the vendor may recover the price, if he keeps them in readiness for delivery to the purchaser. Under a contract of sale, when the goods had been so appropriated and set apart, the vendor has done that which by the terms of the agreement makes the whole consideration payable; and so long as he remains ready to do whatever else is to be done to give the vendee the benefit of his purchase, he is entitled to receive the agreed price without deduction on account of his retention of his lien upon the property. White v. Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; Morse v. Sherman, 106 Mass. 430; Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394.

There was sufficient evidence to warrant the judge in finding that the butter answered the requirements of the contract. The plaintiffs appropriated it to the defendant as butter of the quality called for. Their conduct then and afterwards was equivalent to a declaration that it conformed to the agreement of the parties. Afterwards shipments were made from time to time of a part of it, amounting to 40 tubs in all, which were accepted and paid for by the defendant without objection. This was an admission by the defendant that the quality of the 40 tubs was such as he expected. The bill sent to the defendant in the first place gave the separate weight and tare of each tub of butter. The defendant directed the shipping to him of the remaining 20 tubs, and the only dispute between the parties at that time was in regard to the terms of payment; the plaintiffs asserting that the property was to be paid for on demand, before parting with the possession, and the defendant contending that he was entitled to receive it, and to have three months from the time of sale in which to make payment. While these facts do not make it certain that the 20 tubs remaining in the possession of the plaintiffs were of good quality, they warrant an inference in favor of the plaintiffs' contention, in the absence of anything to show the contrary. The last instruction requested was therefore rightly refused.

Exceptions overruled.

## BRYANS v. NIX.

(Court of Exchequer, 1839. 4 Mees. & W. 775.)

Parke, B.[26] The question in this case is, whether the property in the oats on board two boats, No. 604, and No. 54, or either of them, was vested in the plaintiffs at the time the defendants took possession of those oats. We think that the property in the former was in the plaintiffs, in the latter not.

The facts of the case, necessary to its determination, may be very shortly stated. Miles Tempany, a corn-merchant at Longford, who employed the plaintiffs as his factors at Liverpool, shipped on board the boat, No. 604, a full cargo of oats, and took a bill of lading or boat-receipt for them, signed by the master, bearing date the 31st of January, 1837, whereby he acknowledged the receipt of the oats on board, deliverable in Dublin to John and T. Delany, in care for and to be shipped to the plaintiffs in Liverpool. On the same day, he procured from the master of another boat, No. 54, a like bill of lading or receipt, for 530 barrels, but no oats were then on board that boat, although a cargo was prepared for that purpose. On the 2d of February, Tempany wrote to the plaintiffs a letter enclosing both those instruments, and stating that he had valued on the plaintiffs for £730 against those oats. On the 7th, the plaintiffs received this letter, and accepted the bill of exchange, and returned it to Tempany, who received it on the 9th.

In the meantime, the defendant, who was a creditor of Tempany to a considerable amount, sent over Mr. Walker, an agent, to Longford. Walker arrived on the 6th, and pressed him for security. Tempany consented on that day to give him an order, addressed to Tempany's brother, his agent in Dublin, desiring him to deliver to Walker, for the defendant, the cargo of boat 604, which had then sailed for Dublin, and four other cargoes, including that of boat 54, (which was stated to be 560 barrels,) and also all that was in Tempany's store in Dublin.

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[26] The statement of facts is omitted.

The boat 54 was then partially loaded, and Tempany promised to send the boat-receipt for it to Walker. The loading was completed on the 9th, the boat-receipt or bill of lading, for 550 barrels, which were on board, signed by the master and transmitted to Walker, to whom the cargo was made deliverable, and he received it the next day. The boats were both hired by Tempany, and the men paid by him. Walker, on the 8th, procured an agreement from J. Tempany, in Dublin, to hold the oats for him, when they arrived: and he afterwards got possession of the whole by legal process.

It was contended, that, under these circumstances, the property in neither cargo vested in the plaintiffs; first, because the instruments were not regular bills of lading, and could give no title; and secondly, if they were, they could not operate to give the plaintiffs a title, because they, being factors, could acquire no lien without actual possession.

We think it unnecessary to decide whether the instruments were regular bills of lading, so as to have all the properties which the custom of merchants has attached to those documents. We need not say, whether, like bills of lading, they are the symbols, of property, so that their transfer by endorsement is equivalent to an actual delivery of the goods, which they represent, in specie; nor whether they have the privileges which by the factor's act are given to such instruments. These are matters wholly collateral to the present inquiry. The true question here is, what is the meaning and effect of the two documents, by whatever name they are called, coupled with the letter from Tempany, of the 2d of February, followed by the acceptance by the plaintiffs of Tempany's draft? It seems to us to be clearly this,—that Tempany agrees that the oats therein specified, shall be held from that time by the boat-masters, for the plaintiffs, in their own right, provided they accept the bill, as a security for its payment—that the masters agree so to hold them, and that, by the plaintiff's assent and acceptance of the bill, the conditional agreement becomes absolute. The transaction is in effect the same, as if Tempany had deposited the goods with a stakeholder, who had assented to hold them, for the plaintiffs, in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instruments are bills of lading or not: and it might equally be proved through the medium of carriers' or wharfingers' receipts, or any other description of document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master, employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property; and the depositary assents; it is enough: and it matters not by what documents this is effected; nor is it material whether the person who is to have the property be a factor or not; for such an agreement may be made with a factor, as well as any other individual.

In the present case we are of opinion that this is satisfactorily made out, with respect to the first boat-load: and the fact that the instrument signed by the master, specifies that the goods are to be carried to and delivered at Dublin, to an agent of the plaintiffs, is decisive to show that the plaintiffs are to take immediately in their own right, and are not mere consignees of Tempany, who are to have their lien when the goods arrive, as factors. And this case is distinguishable, on this ground, from Kinloch v. Craig, Bruce v. Wait, and Nichols v. Clent, in none of which was there any documentary or other evidence to prove that the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier: and the case resembles that of Haille v. Smith, where the bill of lading being transmitted for a valuable consideration, operated as a change of property instanter, when the goods were shipped; and it is also governed by the same principle upon which I know that of Anderson v. Clark was decided, where a bill of lading, making the goods deliverable to a factor, was, upon proof from correspondence of the intention of the principal to vest the property in the factor, as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery.

In our opinion, therefore, the plaintiffs had a complete title to the cargo of the boat 604, at least on the 7th of February, when they complied with the condition by accepting the bill: and before the 7th, no other title to the oats intervened; for the order to deliver them to Walker, given on the 6th, was clearly executory only. But the claim of the plaintiffs to the cargo of boat 54, stands on a very different footing.

At the time of the agreement, proved by the bill of lading or boat-receipt of the 31st January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board; and consequently no specific chattels which were held for them. The undertaking of the boat-master had nothing to operate upon, and though Miles Tempany had prepared a quantity of oats to put on board, those oats still remained his property; he might have altered their destination, and sold them to any one else; the master's receipt no more attached to them, than to any other quantity of oats belonging to Tempany. If indeed, after the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less, for the purpose of fulfilling the contract, and received by the master as such, before any new title to these oats had been acquired by a third person, we should have probably held, that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate, as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs, that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put, the master should hold them on their account: and when that agreement was fulfilled, then, but not otherwise, they would become their property. But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded, and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him; for such is the effect of the delivery order of the 6th, and the agreement with Walker, of the same date, to send the boat-receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory: on the 9th this appropriation took place, by the boat-receipt for the 550 barrels then on board, which was signed by the master, at the request of Tempany; whereby the master was constituted the agent of the defendant to hold those goods; and this was the first act by which these oats were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, on account of the plaintiffs, but he did not do so.

It is proper, however, to notice the very ingenious argument used on the part of the plaintiffs, founded on the doctrine of estoppel, as applied to real estate. If a man, by indenture, demises a certain manor, which he has not, and then purchases the manor, and afterwards sells or demises to B., the first lease operates against the purchaser or second lessee; and by analogy to this case, it is contended that the first bill of lading was good for the plaintiffs by estoppel, against the master, and consignor; and against the defendant, who claims that cargo which was put on board under the consignor. But this analogy does not hold; in the case of real property, the lease is a conclusive admission by the lessor, that he has a title to the specific estate demised, which binds a subsequent purchaser of that estate: here the bill of lading is a conclusive admission only that some oats, amounting to the specified quantity, were on board. In the former case, the estate is identified and ascertained at the time of the admission: in the latter, no property existed to which the admission applied, for no oats were on board; and they are not otherwise ascertained, than by that statement that they were on board; and the person who afterwards purchases any oats from the consignor, might as well be said to purchase those to which the estoppel relates, as he who purchases those which were afterwards put on board. And besides, it may well be doubted whether the doctrine of estoppel applies to personal chattels at all, so as to bind a subsequent purchaser of them.

For these reasons, we think that the plaintiffs are entitled to the first cargo of oats, but not to the other; and the rule must be discharged as to boat 604, and the verdict reduced by the value of boat 54.

Rule accordingly.

## ALDRIDGE v. JOHNSON.

(Court of Queen's Bench, 1857. 7 El. & Bl. 885.)

This was an action brought by the plaintiff to recover certain goods alleged to be his property, and to have been detained by the defendant; or the value of such goods, and damages for their detention; and also to recover damages for the wrongful conversion of the same goods by the defendant.

The defendant pleaded to the whole declaration: 1st. Not guilty; and, 2dly, that the goods were not the plaintiff's property.

On the trial, before Erle, J., at the Sittings in London in last Hilary Term, a verdict was found for the plaintiff, by consent, for the whole amount of his claim, and costs 40s., subject to the opinion of the Court upon the following case:

The plaintiff agreed to take from one Knight one hundred quarters of barley out of the bulk, which he had inspected and approved, in Knight's granary at £2. 3s. a quarter, in exchange for thirty-two bullocks, at £6. apiece. The difference to be paid to Knight in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which Knight was to fill, to take to the railway, and to place upon trucks free of charge. Each quarter of barley would fill two sacks, and the plaintiff sent two hundred sacks, some of them with his name marked on them, and Knight filled one hundred and fifty-five sacks, leaving in the bulk more than enough to fill the other forty-five, but Knight could not succeed in obtaining trucks. The plaintiff requested that the one hundred and fifty-five sacks should be sent to him. He afterwards complained to Knight of the delay, and was assured that the barley would be put on the rail that day, but this was not done; and Knight finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again.[27]

Lord CAMPBELL, C. J. In cases of this sort there often is great doubt and great difficulty; but the present case seems to me, on both points, free from all doubt and difficulty. I think that no portion of what remained in bulk ever vested in the plaintiff. We cannot tell what part of that is to vest. No rule of the law of vendor and purchaser is more clear than this: that, until the appropriation and separation of a particular quantity, or signification of assent to the particular quantity, the property is not transferred. Therefore, except as to what was put into the 155 sacks, there must be judgment for the defendant.

It is equally clear that, as to what was put into those sacks, there must be judgment for the plaintiff. Looking to all that was done, when the bankrupt put the barley into the sacks eo instanti the property in each sackful vested in the plaintiff. I consider that here was a priori an assent by the plaintiff. He had inspected and approved of the barley in bulk. He sent his sacks to be filled out of that bulk. There can be no doubt of his assent to the appropriation of such bulk as should have been put into the sacks. There was also evidence of his subsequent appropriation, by his order that it should be sent on. There remained nothing to be done by the vendor, who had appropriated a part by the direction of the vendee. It is the same as if boxes had been filled and sent on by the bankrupt, in which case it cannot be disputed that the property would pass: and it can make no difference that the plaintiff ordered the sacks to be forwarded by the vendor. As to the question of conversion, the property being in the plaintiff, he has done nothing to divest himself of it. It is not like the case of confusion of goods, where the owner of such articles as oil or wine mixes them with similar articles belonging to another. That is a wrongful act by the owner, for which he is punished by losing his property. Here the plaintiff has done nothing wrong. It was wrong of the bankrupt to mix what had been put into the sacks with the rest of the barley; but no wrong has been done by the plaintiff. That being so, the plaintiff's property comes into the hands of the defendant as the bankrupt's assignee. If the defendant had a lien, he does not detain the barley on that ground. He denies the plaintiff's property altogether, and cannot therefore claim a lien. He claims all the barley, and claims all of it as being the property of the bankrupt. He therefore has converted the plaintiff's property.

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[27] This condensed statement of facts is taken from Benjamin, Sales (5th Eng. Ed.) p. 347.

ERLE, J. I also am clearly of opinion that the property in what was put into the sacks passed to the plaintiff. It is clear that, where there is an agreement for the sale and purchase of a particular chattel, the chattel passes at once. If the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is ascertained. Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested in the vendor only, the bankrupt. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed. That might be shown by sending the goods by the railway: and in such case the property would not pass till the goods were despatched. But it might also be shown by other acts. Here was an ascertained bulk, of which the plaintiff agreed to buy about half. It was left to the bankrupt to decide what portion should be delivered under that contract. As soon as he does that, his election has been indicated; the decisive act was putting the portion into the sacks. If it were necessary to rest the decision on the assent of the vendee in addition to this, I am of opinion that there is abundant evidence of such assent; for the vendee demanded, over and over again, the portion which had been put into the sacks. I think Mr. Blackburn has expressed the law with great clearness and accuracy. He first takes the case where one party appropriates and the other assents; and then the case where, by virtue of the original agreement, the authority to appropriate is in one party only. As to the question of conversion, I am of opinion, on the grounds which have already been stated, that the assignee has converted the plaintiff's property.

Judgment for plaintiff, as to the part put into the sacks; as to the residue, judgment for defendant.[28]

## LANGTON v. HIGGINS.

(Court of Exchequer, 1859. 4 Hurl. & N. 402, 28 L. J. Exch. 252.)

The first count of the declaration was in detinue for cases and bottles of oil of peppermint. The second count was in trover for the same goods.

Pleas: First, not guilty. Secondly, that the goods were not, nor were any or either of them, the plaintiff's as alleged.

At the trial, before Martin, B., at the London sittings after last Hilary term, the following facts appeared:—The plaintiff was a wholesale druggist in London, and the defendant was a wholesale druggist at Liverpool. For many years past the plaintiff had been in the habit of contracting with one Carter, a farmer at Leverington in Cambridgeshire, for the purchase of all the oil of peppermint to be distilled from the crop of peppermint which might be grown on his farm in that year. The contracts were made in the early part of the year, and Carter obtained from the plaintiff advances in respect of them. On the 27th January, 1858, the plaintiff and Carter entered into the following agreement:

"London, Jan. 27th, 1858.

"The undersigned, Frederick Carter, of Leverington, agrees to sell to Messrs. William Langton & Co., of London, the whole of his crop of oil of peppermint grown in the year 1858, at the rate of 21s. per lb.

"But should the said crop amount to 250 bottles of oil, he agreed to deduct 6d. per lb. from the said 21s. and above that quantity 1s. per lb., provided the Messrs. Langton find the said 21s. per lb. is more than they can reasonably afford.

"This agreement is made upon the condition that Messrs. Langton & Co. advance the said Frederick Carter 1000*l*. on account of the above-named crop, and pay the amount due at the time of delivery by two, four, and six months bills. Fred. Carter."

Previously to this agreement advances had been made by the plaintiff to Carter to the extent of £310., and on the day the agreement was signed Carter gave to the plaintiff a bill of sale of his live and dead stock, crop of oil of peppermint, crops of corn, furniture, &c., as a security for the £310. and further advances to the extent of £1000. It was usual for the plaintiff to send to Carter bottles to be filled with the oil of peppermint, and, in September, Carter applied for the bottles and some gut-skin to cover them. The plaintiff accordingly sent him two gross of bottles with gut-skin. On the 8th of October, Carter wrote to the plaintiff, "We shall lose no time in getting the oil off." It was the business of Mrs. Carter to put the oil of peppermint in the bottles, which, as on previous occasions, she did in the following manner. She first weighed the empty bottles and then filled them with the oil. She then weighed them again, having previously marked the tare and weight of each bottle on a piece of paper pasted on it. She then marked the gross weight of the oil and the bottle, and added them together on the same paper. She then subtracted the tare and placed the net weight and the number of the bottle upon the paper and laid the bottle aside. After the bottles were filled, by Carter's direction, she made out invoices and address cards, which she placed in Carter's desk. She was engaged in these operations about nine days, and finished on the 29th of September. On all previous occasions, the bottles, when filled, were placed in cases and delivered to a carrier to take to the railway station, to be forwarded to the plaintiff in London. Carter left his home on the 15th of October, and has not since been heard of. The defendant purchased of Carter fifteen cases of the oil of peppermint, nine of which were delivered to him at Liverpool on the 16th of September, and the others on the 23d.

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[28] Concurring opinions were delivered by Coleridge and Crompton, JJ.

It was submitted on behalf of the defendant that under these circumstances the property in the oil of peppermint did not vest in the plaintiff. The learned Judge directed a verdict for the plaintiff for £626. 15s., reserving leave to the defendant to move to enter a nonsuit, or to reduce the amount to the value of the bottles.

BRAMWELL, B. I am also of opinion that the rule ought to be discharged. The contract is to sell the whole of the vendor's crop of oil of peppermint grown in a certain year. I do not think that when the oil was made the property passed,—possibly there may have been an obligatio certi corporis; but it appears to me that when the oil was put into the plaintiff's bottles the property in it vested in her. I do not dissent from what was said by my brother Martin with respect to the delivery to a carrier. It may be that the vendor would be bound to show some act of delivery before he could sue for the price; but however that may be, I am of opinion that the property vested in the plaintiff when the oil was put into her bottles. Looking at the principle, there ought to be no doubt. A person agrees to buy a certain article, and sends his bottles to the seller to put the article into. The seller puts the article into the buyer's bottles, then is there any rule to say that the property does not pass? The buyer in effect says, "I will trust you to deliver into my bottles, and by that means to appropriate to me, the article which I have bought of you." On the other hand the seller must be taken to say, "You have sent your bottles and I will put the article in them for you." In all reason, when a vendee sends his ship, or cart, or cask, or bottle to the vendor, and he puts the article sold into it, that is a delivery to the vendee. If we could suppose the case of a metal vessel filled with a commodity which rendered the vessel useless for subsequent purposes, it would be monstrous if the vendor could say, "I have destroyed your vessel by putting into it the article you purchased, but still the property in the article never passed to you." Or suppose a vendor was to deliver a ton of coals into the vendee's cellar, could he say, "I have put the coals in your cellar, but I have a right to take them away again?"

But, independently of reason, there is an authority on the subject. In Blackburn on Contracts, it is said that the property does not pass unless there is an intention to pass it, and various cases are cited in support of that position. It is then said, page 151, that two rules have been laid down on the subject. The first is, "that where by the agreement the vendor is to do anything to the goods, for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property." The second rule is, "that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of those things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted." That is not only good law but good sense. Then, can there be more complete evidence of intention to pass the property than when the vendee sends her bottles to be filled with the article purchased, and the vendor puts it into the bottles? Therefore, both upon principle and authority, I think that the property in the oil passed to the plaintiff when it was put into the bottles. The case of Aldridge v. Johnson, 7 E. & B. 885 (E. C. L. R. vol. 90), is precisely in point. Lord Campbell, C. J., there said: "Looking to all that was done when the bankrupt (the vendor) put the barley in the sacks, eo instanti the property in each sack full passed to the plaintiff." It is true that in the Law Journal, Erle, J., is reported to have said that the outward act indicating the vendor's intention, was by filling the sacks "and directing them to be sent to the railway." But Crompton, J., who doubted upon another point, said, that "when the barley was put into the sacks, it was just as if it had been sent by a carrier." Therefore there is not only reason and general authority, but also the case of Aldridge v. Johnson, to warrant our judgment.

The only difficulty I had was this: Suppose the oil of peppermint had been badly manufactured, I am not prepared to assent to the argument that the plaintiff would not have had a power of rejection. Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the plaintiff was not bound to take a part only, would the property vest? Aldridge v. Johnson is an authority on that point. It may be that the plaintiff would have the option of refusing to take a part only of the oil or of accepting it, but that right is not inconsistent with the property vesting at his election. It might vest in him conclusively, but at all events it would vest when he exercised his option. For these reasons, I think that the rule ought to be discharged.

Rule discharged.[29]

## COLONIAL INS. CO. v. ADELAIDE MARINE INS. CO.

(Privy Council, 1886. 12 A. C. 128.)

Sir Barnes Peacock.[30] This is an appeal from a judgment of the Supreme Court of South Australia in a suit in which the Adelaide Marine and Fire Assurance Company, now the respondents, were plaintiffs, and the Colonial Insurance Company of New Zealand, and certain other persons to whom it is not now necessary to refer, were defendants. In stating their reasons for the recommendation which their Lordships are about to make to Her Majesty in Council, they will, for the sake of clearness, speak of the parties to this appeal respectively as the plaintiffs and the defendants.

The suit was brought upon a contract of insurance alleged to have been entered into by the defendants with the plaintiffs.

It appeared that, on the 29th of September, 1881, Messrs. Morgan, Connor & Glyde chartered a vessel called the Duke of Sutherland to proceed from Algoa Bay to a good and safe port in New Zealand, and there to load from the charterers a full and complete cargo of wheat in bags, and being so loaded to proceed direct to Queenstown, Falmouth or Plymouth, at captain's option, for orders to be given within forty-eight hours, to any safe port in the United Kingdom, or on the Continent, &c.

By the terms of the charterparty, all expenses of stowing were to be paid by the ship, freight to be payable at rates specified by charterparty, the cargo to be brought to and taken from alongside at merchants' risk and expense, thirty working days to be allowed for loading, the captain to sign bills of lading for the cargo, according to the custom of the port, at the current or any rate of freight, without prejudice to the charterparty, for which purpose he was to attend daily at the charter's or agent's office during business hours if so required, and should the freight list according to bills of lading show a less sum on aggregate than chartered freight, the difference was to be paid in cash prior to the signing of bills of lading. The vessel to have a lien on cargo for freight and demurrage.

[29] Concurring opinions were delivered by Pollock, C. B., and Martin, B.

[30] The statement of facts and part of the opinion are omitted.

Subsequently Messrs. Morgan, Connor & Glyde received a proposal in a letter, dated the 10th of March, 1882, from the New Zealand Grain Agency, to supply a cargo of wheat for the said vessel at Timaru, at 4s. 7d., free on board, provided she had sailed from Algoa Bay for that port, sacks 9d. Messrs. Morgan, Connor & Glyde verbally accepted the proposal.

The Duke of Sutherland had sailed from Algoa Bay at the date of the proposal, and she arrived at Timaru before the 30th of March, 1882. The plaintiffs having agreed with Messrs. Morgan, Connor & Glyde to insure the cargo of wheat for a sum not exceeding £14,000, applied to the defendants, by a letter dated the 30th of March, 1882, to hold them covered for not exceeding £2000, being two-fourteenths interest in cargo of wheat per Duke of Sutherland, at and from Timaru to United Kingdom, or Continent. F. P. A. rate charged to be that ruling in New Zealand for similar risks.

On the same day the defendants by their local managers sent the following answer:

[Here follows a letter which was held to be an acceptance of the plaintiff's proposal.]

The delivery of the wheat by the New Zealand Grain Agency on board of the Duke of Sutherland at Timaru commenced shortly after the 30th of March, 1882. Before the completion of the cargo, viz., on the 3d of May, 1882, the vessel and the wheat on board were lost by the stranding of the vessel during a gale at Timaru. It was admitted by the defendants that the vessel was seaworthy, and that she was lost by perils of the seas. At the time of the loss 2500 bags of wheat out of a total cargo of 13,000 remained to be delivered in order to complete the cargo.

Messrs. Morgan, Connor & Glyde paid the New Zealand Grain Agency for the wheat which they had put on board, and the plaintiffs having paid Messrs. Morgan, Connor & Glyde for the loss of wheat, in accordance with their contract for insurance, called upon the defendants to indemnify them, in accordance with their contract of cover. The defendants denied their liability, and the plaintiffs commenced an action against them in the Supreme Court of South Australia. The cause was tried before the Honourable Samuel James Way, the learned Chief Justice of the Court, who gave judgment in favour of the plaintiffs and on motion by way of appeal to the Full Court the appeal was dismissed.

The present appeal is from the judgment of the Full Court.

* * *

Upon the argument before their Lordships, the learned counsel for the defendants contended, 1st, that there was no contract of insurance; 2d, that at the time of the loss the risk had not commenced; 3d, that the plaintiffs had no insurable interest. * * *

The last objection, viz., that the plaintiffs had not an insurable in terest, was the most important one. It depends upon the question whether Messrs. Morgan, Connor & Glyde had an insurable interest, for if they had not an insurable interest the plaintiffs had not an insurable interest, and the payment by the plaintiffs to them under their policy was a mere voluntary payment. * * *

In Anderson v. Morice, 1 App. Cas. 713, it was held by the Exchequer Chamber, reversing a unanimous judgment of the Court of Common Pleas, that the property in the rice which was put on board the seller's vessel in the course of completing the cargo, and which was lost by perils of the sea before the cargo was complete, did not vest in Anderson under his agreement for purchase; that there was nothing to shew that it was to be at his risk, and consequently that he had no insurable interest. The decision of the Exchequer Chamber, from which one of the judges, Mr. Justice Quain, dissented, was appealed to the House of Lords, and affirmed, the noble Lords who heard the appeal being equally divided in opinion.

Their Lordships, notwithstanding the great diversity of opinions expressed in that case, are not prepared to throw any doubt as to the correctness of the decision. But admitting it as an authority to the fullest extent, they consider that it is not applicable to the circumstances of the present case.

In each of the cases the insurance was on a "cargo," a word which, as already pointed out, is susceptible of different meanings in different contracts, and which must be interpreted with reference to the context.

In Anderson v. Morice, Law Rep. 10 C. P. 58, 1 App. Cas. 713, Anderson agreed with Messrs. Borradaile, Schiller & Co. to purchase the cargo of new crop Rangoon rice per Sunbeam at 9s. 1½d. per cwt. cost and freight, expected to be March shipment. Payment by seller's draft on purchaser at six months' sight with documents attached. The cargo to be purchased in that case was an entire thing, and was not in existence at the time when the contract was entered into, and would not be in existence until the whole cargo should be put on board.

In the present case the vendors did not sell a particular cargo on board a ship chartered by them, but merely offered to supply a cargo of wheat for the Duke of Sutherland at 4s. 7d., free on board at Timaru. No time or mode was fixed for payment, and nothing was said as to the place to which the cargo, when supplied and put on board, was to be carried, or to the effect that the sellers were to have anything to do with bills of lading or other shipping documents. The purchasers accepted the offer, they themselves being the charterers of the Duke of Sutherland, whereas in Anderson v. Morice, Law Rep. 10 C. P. 58, 1 App. Cas. 713, the firm who agreed to sell the cargo of rice by the Sunbeam were themselves the charterers of that vessel, and were to receive freight for the carriage of the rice, such freight being included in the purchase-money. In putting the rice on board the Sunbeam the sellers were not delivering it to Anderson, but were putting it on board a vessel, of which they were the charterers, for the purpose of completing the cargo which they had agreed to sell. The master of the Sunbeam received it on their account, and not on account of the purchasers. The purchasers' right was to depend on the shipping documents which were to be under the direction of the sellers.

In the present case, in putting the wheat on board the Duke of Sutherland, the contractors were delivering it to the purchasers in pursuance of their contract to put it free on board, the master of the vessel which had been chartered by them being their agent to receive it on their account. The shipowners received it under the charterparty by which they bound themselves to load from the charterers a full and complete cargo, and to proceed with it, &c., as ordered by the charterers or their agents. The sellers had nothing to do with the wheat or the destination thereof after it was on board, and by putting it on board they did not render themselves liable to the owners of the ship for freight, demurrage, commission, or any other charges provided for by the charterparty. The master would not have been justified in returning to the sellers any portion of the wheat without the authority of the purchasers, who were entitled under the charterparty to have bills of lading signed for it as directed by them according to the terms stipulated by the charterparty. From the very nature of the contract to supply a cargo of wheat for a ship of 1047 tons register, and which it is admitted would consist of 13,000 bags of wheat, it could not have been intended that the whole supply should be completed at the same moment or even in a single day. By the charter thirty days were to be allowed for the loading, and upon a proper construction of the contract of sale, in which nothing was stipulated as to the time of delivery or payment, the sellers would have a reasonable time to deliver it on board. By the charterparty the cargo was to be brought to and taken from alongside at merchant's risk and expense. By the vendors' contract they were to put it free on board for the charterer, and when put on board the master would receive it for the purchasers and hold it for them.

In many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the very nature of the case, be delivered at one time, and it must frequently happen, as in contracts for supplies of provision for the army or navy, or any large establishments, that the quantities first delivered are appropriated and actually consumed by the persons to whom they are delivered before the expiration of the period within which the whole contract is to be performed. As no time was fixed by the contract for the payment of the purchase-money the purchasers might not have been bound, if no loss had occurred, to pay for the wheat put on board from time to time until the whole cargo had been supplied; but it does not follow that they had not an insurable interest before the price was paid or payable. It appears from what follows that a man may have an insurable interest in goods for which he has neither paid nor become liable to pay.

In the present case, if no loss had happened, and the sellers, without lawful excuse, had neglected to supply a complete cargo, the purchasers must have paid for the wheat which had been put on board, unless they returned it. If the sellers had completed the cargo the purchasers must have paid for the whole. In either case they had, at the time of the loss, an interest in the part which had been put on board. In the one case, that they might be able to return it to excuse them from payment for it in the event of their electing to put an end to the contract in case of the non-completion of the supply; in the other, that they might have the goods for which they would be obliged to pay.

In Oxendale v. Wetherell, 9 B. & C. 387, it was correctly stated by Mr. Justice Parke, that "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of the time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed to perform his contract, the latter may recover the value of the goods which he has so delivered." In the case cited it was decided accordingly. Applying the law as laid down in that case to the present, the purchasers, if no loss had occurred, might, subject to the rights of the shipowners to their lien for freight under the charterparty, have returned the wheat which had been put on board if the contractors had, without any lawful excuse, refused to supply a full cargo within a reasonable time, but they would not have been obliged to do so; they might have retained and paid for the part delivered, and sued the contractors for damages for not completing their contract; on the other hand it is clear that the sellers could not without the consent of the purchasers in the case supposed have taken out of the ship the whole of the wheat which they had put on board, and have compelled the ship to go empty away, because they themselves had failed to complete their contract. * * *

Their Lordships are of opinion that the delivery of the wheat from time to time was a delivery to the purchasers, that it vested in them the right of possession as well as the right of property, and that at the time of the loss it was at their risk. The right which they had to return the wheat which had been delivered, in the event of the sellers neglecting, without lawful excuse, to complete the supply, did not prevent them from having an insurable interest. The interest in this case was defeasible, not by the vendors, but at the option of the vendees in the event of the vendors not completing the contract. * * *

They will, therefore, humbly recommend Her Majesty to affirm the judgment of the full bench, and to dismiss the appeal.

The appellants must pay the costs of the appeal.

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## ROCHESTER & OLEOPOLIS OIL CO. v. HUGHEY.

(Supreme Court of Pennsylvania, 1867. 56 Pa. 322.)

Before THOMPSON, STRONG, READ and AGNEW, JJ. WOODWARD, C. J., absent.

Error to the Court of Common Pleas of Alleghany county: No. 92, to October and November Term, 1867.

In the court below the Rochester & Oleopolis Oil Company brought an action of assumpsit to September 1866, against J. M. Hughey, to recover the price of a quantity of oil alleged to have been sold and delivered by the plaintiffs to the defendant.

The oil having been burned, the question was whether the delivery was complete before the burning.

The plaintiffs gave evidence, by the deposition of A. L. Burnett, their agent, that he sold to Owsten, the agent of the defendant, four barge-loads of oil, about 2200 barrels, at $4.50 per barrel, deliverable at Oleopolis, to be measured in the iron tanks of the Pennsylvania Tube Company.

The tube company receives the oil at the oil regions in their tubes; it is transported through the tubes and received into the tanks of the company at the several shipping points on the Alleghany river. The oil of the respective owners is not kept separate, but is measured when received by the tube company, and is delivered to the order of the owner by measurement at the tanks.

The evidence of plaintiffs further was, that 495 gallons had been run on the afternoon of June 19th, 1866, into a barge furnished by Owsten; another barge was placed under the tanks, and about 450 barrels had passed into it, when the oil took fire, and both barges and the oil were burned.

The plaintiffs then offered to prove that by the custom of the trade at Oleopolis the barges to receive the oil were, during the delivery, in the custody and control of the purchaser. This was objected to by the defendant, rejected by the court, and a bill of exceptions sealed.

Owsten, the defendant's agent, testified for him, that he made the contract for four boat-loads of oil, about 2000 barrels; he sent two boats to receive it; he received word that his boat was drawing 25 inches of water, and the river was falling; he went to Oleopolis, and found the river rising, and that another boat was loading outside of his; he told the agent of the company that he would load his boat five inches more, and therefore did not move her from the wharf. After the boat that had been loading near his was filled and moved away, he placed an empty boat by his first boat, and the tube company's hands let the oil into the second boat; before this boat was full, drawing but about 17 inches, it took fire, and both boats with oil were burned. He testified, also: "the boats were not in a condition to run to Pittsburg; he intended to put more in them, to fill them to 30 inches of water."

In rebuttal, the plaintiff proposed to ask the superintendent of the tube company, "whether, at any time whilst you were superintending, or since, within your knowledge, the tubing company, or the owners of oil in the tanks, kept persons at the works for the purpose of taking charge of the boats whilst the oil was being delivered."

The offer was rejected by the court, and a bill of exceptions sealed for the plaintiff.

The plaintiff requested the court to charge the jury:

1. That if the oil sold by plaintiff to Hughey was to be measured in the tanks of the Pennsylvania Tubing Transportation Company, and delivered in barges furnished by Hughey, and the barges were, during the course of delivery, in possession and control of Hughey, or his agents, the oil was delivered as soon as it entered the barges, so far as to change the property as between seller and buyer, and the plaintiff would be entitled to recover the value of the oil so delivered in the barges.

2. That if the jury find that the barges were, during the time of delivery of the oil, in the custody of the plaintiff, nevertheless, as soon as any portion of the oil was separated from the common bulk, by measurement from the tanks, it became the property of the defendant, and was at his risk, and the plaintiffs would be responsible only for loss occasioned by their negligence.

3. If the jury find that it was the duty of the Pennsylvania Tubing Transportation Company to take charge of and control the barges while the oil was in course of delivery, that the company would be the common agent of plaintiff and defendant, and any portion of the oil, as soon as separated from the common bulk, would be the property of the defendant, and at his risk, and the plaintiff would be entitled to recover for the value of the oil so delivered.

The points were all refused.

The defendant, in his 2d point, requested the court to charge that under the contract the defendant was not bound to accept a delivery of oil from the plaintiff in any less quantity than that of one full boat, the question of whether the boat was full or not to be decided by the defendant or his agent, Mr. Owsten, only.

To which the court answered: "Affirmed if you believe the contract to be for the sale of oil by the boat-loads."

The court (Stowe, A. J.) charged:

"The first point is as to what the contract was:

"If it was to be delivered in boat-loads, and the purchaser had the right to say when the boat was loaded, and you should find that this boat was not accepted by defendant's agent, and that he was not bound to accept it because it was not a boat-load, that is, not filled so that he was bound to take it from the vendor, then there was no delivery in law, and plaintiff cannot recover.

"If you should find, however, that the first boat was reasonably loaded, so that purchaser was bound to accept, or that the boat was actually taken into his charge so as to waive the right to have more oil put into it, then plaintiff can recover for that.

"As to the oil running into the boats at the time, there was no delivery of that in law, because if the contract was for delivery in boat-loads, about 2000 gallons as stated by the witnesses on both sides, the boat was not filled so that plaintiff was bound to take it from the vendor.

"As to this latter it is clear under all the evidence that if the plaintiff had shut off the oil and requested defendant to pay for what was in the boat, he could not have compelled defendant to receive it, nor to pay for it.

"In reference to the first boat, was there anything further to be done before the plaintiff had a right to require the defendant to take and pay for it?

"That depends upon whether the barge was sufficiently full, or not being full, whether Owsten, defendant's agent, had already taken possession of it, under such circumstances as to indicate he was satisfied to take it as it was.

"As to the latter the plaintiff cannot recover in this action, because it is not pretended that the boat was in a condition to deliver."

The verdict was for the defendant.

The plaintiffs took a writ of error, and assigned for error the rejection of their offers of evidence; the answers of the court to their points, and to the defendants' second point, and that "the court erred in the whole charge and in each part thereof, and especially in the assumption that the plaintiff was not entitled to recover unless the boats were so loaded that the defendants were bound to accept them."

THOMPSON, C. J. The question was submitted to the jury on the trial below, and they found that the contract between the plaintiff and defendant was for the sale and delivery of four barge-loads of oil, and not a sale of oil by the barrel. Of course until delivery no specific oil passed to the defendant. Until this took place, he had only a right of action to recover for a breach of contract.

It is unnecessary to say whether the defendant was bound to take, and pay for the number of barrels in each completely laden barge; if there be a question about that, it is not here—but whether the contents of partially laden barges in progress of being filled passed as fast as it entered the barge. The court thought not, and so decidedly think we. The defendant could not be compelled to take a partly filled barge when he had contracted for full ones, any more than if he had contracted for a barrel of oil could he have been compelled to accept one half or quarter full. This would hardly be contended for, yet the principle is the same. Winslow, Lanier & Co. v. Leonard, 24 Pa. 14, 62 Am. Dec. 354; Story on Sales, §§ 296, 299. Under the finding of the jury there is little room for argument against the ruling complained of. Nor do we see any error in rejecting the offers of testimony. Not one of the assignments of error were according to the rule and we might have dismissed them all without notice, but did not, hoping for more accuracy in the future.

Judgment affirmed.

## SECTION 7.—DELIVERY TO CARRIER AS APPROPRIATION

### SMITH et al. v. EDWARDS et al.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 221, 30 N. E. 1017.)

HOLMES, J. This case comes before us on the exception of the Old Colony Railroad Company to a ruling of the court below that it should be charged as trustee of the defendants. The defendants have been defaulted. The bill of exceptions purports to state the evidence introduced on the motion to charge the trustee, but does not disclose the findings of the judge. We assume them to have been the most favorable for the ruling which the bill of exceptions warrants. The defendants in Ohio ordered of the plaintiffs, who are manufacturers of boots and shoes in Massachusetts, through the plaintiffs' traveling salesman, certain calf and buff shoes, to be made according to a sample shown to the defendants. It was assumed at the argument, and we assume, that the contract bound the defendants, that there is no question under the statute of frauds, and that the shoes were made according to sample. They were forwarded over the Old Colony Railroad, we must assume, if it be material, at the defendants' expense, and were delivered to the defendants. This mode of forwarding undoubtedly was authorized by the contract. The defendants accepted the buff shoes, but refused to accept the calf shoes, and shipped the latter back to the plaintiffs by the same railroad. The plaintiffs refused to accept them, sued the defendants for the price of the shoes, and trusteed the railroad company. The calf shoes mentioned are the goods for which the railroad company was charged.

It is argued for the trustees that, although the defendants were guilty of a breach of contract in refusing to accept the calf shoes, yet, as the shoes were not in existence at the date of the contract, they did not become the defendants' property until tendered to and accepted by the defendants, after they were made.

Of course, the title to the shoes could not be vested in the defendants without their consent. But, in the present state of the law, it does not need argument to show that a contract can be made in such a way as subsequently to pass the title, as between the parties, to goods unascertained at the time when the contract is made, without a subsequent acceptance by the buyer, if the contract commits the buyer in advance to the acceptance of goods determined by other marks. Blanchard v. Cooke, 144 Mass. 207, 227, 11 N. E. 83; Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112; Rodman v. Guilford, 112 Mass. 405, 407; Brewer v. Railroad Co., 104 Mass. 593, 595; Nichols v. Morse, 100 Mass. 523; Middlesex Co. v. Osgood, 4 Gray, 447, 449; Aldridge v. Johnson, 7 El. & Bl. 885, 899.

In the case of goods to be manufactured, the seller, as he has to tender them generally, has the right to appropriate goods to the contract, so far that, if he tenders goods conformable to it, the buyer's refusal to accept them is a breach. The buyer cannot say that he would have accepted some other goods had they been tendered. When goods are to be manufactured and forwarded by a carrier to a buyer at a distance, the seller's delivery of such goods to the carrier, as bailee for the purchaser, passes the title. The seller cannot forward them until they are specified. The delivery is an overt dealing with the goods as those to which the contract applies, and puts them into a possession adverse to the seller. Although not strictly a delivery, it is an act having the legal effect of a true delivery, which, in common legal language, it is said to be. Hallgarten v. Oldham, 135 Mass. 1, 9, 46 Am. Rep. 433; Orcutt v. Nelson, 1 Gray, 536, 543; Merchant v. Chapman, 4 Allen, 362, 364; Kline v. Baker, 99 Mass. 253, 254. The act is required of the seller by the terms of the contract, and thus is assented to in advance by the buyer, on the condition that, as supposed, the goods answer the requirements of the contract. Therefore it is a binding appropriation of the goods to the contract, and passes the title, as we have said. Putnam v. Tillotson, 13 Metc. 517, 520; Merchant v. Chapman, 4 Allen, 362, 364; Odell v. Railroad Co., 109 Mass. 50; Wigton v. Bowley, 130 Mass. 252, 254; Fragano v. Long, 4 Barn. & C. 219; Wait v. Baker, 2 Exch. 1, 7.

The present case could be disposed of upon a narrower ground. It would be enough to say that, so far as we can see, the judge who heard the motion to charge the trustee was warranted in finding as a fact that the defendants authorized the plaintiffs to appropriate the shoes to the contract, even if the inference was not necessary as matter of law. The question always is what intent the parties have expressed, either in terms or by reasonable implication. Anderson v. Morice, L. R. 1 App. Cas. 713; Navigation Co. v. De Mattos, 32 Law J. Q. B. 322, 328, 33 Law J. Q. B. 214.

Exceptions overruled.

## BARTON v. KANE.

(Supreme Court of Wisconsin, 1863. 17 Wis. 37, 84 Am. Dec. 728.)

Action to recover the contract price of cigars and tobacco alleged to have been sold and delivered to the defendant by the plaintiff.

* * *

Verdict for the plaintiff, motion for a new trial overruled, and judgment upon the verdict, from which the defendant appealed.[31]

Dixon, C. J. * * * The motion for judgment of nonsuit should have been granted. The cigars forwarded exceeded the quantity ordered. The order was for 5,000, but the plaintiff sent 5,625. This was no compliance with the order, and imposed no obligation on the defendant, without showing an acceptance in fact by him after the cigars were received, the burden of which was upon the plaintiff. To constitute a delivery to the carrier a delivery to the consignee, so as to pass the title and make the consignee liable for goods sold and delivered, the goods must correspond in quantity as well as quality, with those named in the order. Bruce v. Pearson, 3 Johns. (N. Y.) 534, and Downer v. Thompson, 2 Hill (N. Y.) 137, are clear upon this question; and though the latter was reversed in the court of errors (6 Hill [N. Y.] 208) the main point of reversal cannot arise here. There can be no pretense that the 625 extra cigars were sent out of an abundance of caution, and to insure a scriptural compliance with the order. They were sent to fill up the case, and the defendant was charged with their price. To entitle himself to recover under these circumstances, the plaintiff should have shown that the defendant actually received and accepted the cigars sent, upon the terms indicated in the plaintiff's letter notifying him of the consignment.

When goods ordered prove defective in quality, it is, in general, incumbent on the purchaser to notify the seller of his nonacceptance on that ground; else he is deemed to waive the objection, and to consent to keep and pay for them according to the terms specified. In such case it is considered sufficient evidence of acceptance, that the purchaser has not returned or offered to return the goods, or notified the seller of his non-acceptance. But whether the same rule of evidence should be applied where the quantity, known to the seller, is greater or less than that ordered, may well admit of doubt. Defects in quality may exist without the seller's knowledge. There is nothing in such circumstance which necessarily implies bad faith or a disposition on his part not to fulfill the contract. But where he knowingly sends more or less goods than are ordered, he is guilty of an intentional violation of the contract which he undertakes to perform, and his conduct savors of bad faith; and it would seem that he has no right to presume that the purchaser will accept, or to rely on notice of refusal. He must show an actual acceptance, by proving either that the purchaser retained and used the goods or that he did some other act from which his assent may be presumed. The nonsuit, therefore, at the time it was moved, was proper and should have been granted. * * *

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[31] Part of the statement of facts and part of the opinion are omitted.

Judgment reversed and a new trial awarded.

## STATE v. O'NEIL.
## STATE v. FOUR JUGS OF INTOXICATING LIQUOR.
## STATE v. SIXTY-EIGHT JUGS OF INTOXICATING LIQUOR

(Supreme Court of Vermont, 1885. 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557.)

ROYCE, C. J.[32] The first and most important question presented by these cases is whether or not the intoxicating liquors in question were, (in the first two cases,) in contemplation of law, sold or furnished by the respondent in the county of Rutland and state of Vermont; or (in the last two cases) held and kept for the purpose of sale, furnishing, or distribution, contrary to the statute, within said county and state. The answer depends upon whether the National Express Company, by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the state of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offense against the laws of this state has been committed. If, on the other hand, the sale, by its terms, could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the county court upon the question of the offense were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the state of New York, who selected from their stock such quantities and kinds of goods as they thought proper, in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill or invoice, for collection. The shipment was in each instance, which it is necessary here to consider, C. O. D., and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon the payment of the amounts specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

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[32] The statement of facts and part of the opinion are omitted.

Whether or not, and when, the legal title in property sold passes from the vendor to the vendee is always a question of the intention of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by Morton, J., in Mason v. Thompson, 18 Pick. (Mass.) 305, "the owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point, and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform upon this point; and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. Benj. Sales, §§ 311, 319, note c. When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession. Benj. Sales, § 320, note d. The Vermont cases to the above points are referred to in Robert's Digest, 610 et seq., and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company to be transported by that company, and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely, payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them, and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise to notify the consignor, and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this state.

The authorities upon the above points and principles are so numerous, and are so fully collated in the brief of the learned counsel for the state, and in the text and notes of 2 Benj. Sales, (4th Amer. Ed.,) that we refrain from specific references in support of the conclusions at which we have arrived. These are fully supported by the decision of the United States district court in Illinois, (People v. Shriver, 31 Alb. Law J. 163, s. c. 23 Fed. 134,) a case involving precisely the same question. Treat, J., says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company as the agent of the seller until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor to be shipped to Fairfield, C. O. D., is a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield, and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor, under such an order, was delivered to the express company at Shawneetown, it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser,—the sale would be a sale at Shawneetown—and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar, the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit, the loss would have fallen on himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor." * * * [33]

## STATE v. PETERS.

(Supreme Judicial Court of Maine, 1897. 91 Me. 31, 39 Atl. 342.)

Exceptions from Superior Court, Kennebec County.

Henry B. Peters was indicted for selling butterine contrary to section 3, c. 128, Rev. St., prohibiting the sale and manufacture of adulterated butter.

When the case was closed for the state, the respondent submitted his cause without evidence, and seasonably asked the court to instruct the jury that, upon all the facts of the case, the sale alleged in the indictment did not take place in the county of Kennebec, and that it was therefore the duty of the jury to render a verdict of not guilty. The presiding justice declined to so rule, and a verdict of guilty was thereupon rendered, and respondent brings exceptions. Sustained.

SAVAGE, J. The only question presented by the exceptions in this case is whether, upon all the facts in the case, the sale of butterine alleged in the indictment did or did not take place in the county of Kennebec.

From the undisputed facts it appears that on December 14, 1896, one McLaughlin, then residing in Augusta, wrote to the Portland Beef Company, of which concern the respondent was manager, the following letter:

"Old Orchard, Me., Dec. 14th, 1896. Portland Beef Co.—Gentlemen: Quote me price of butterine, the same I have used the past two seasons (Lincoln flats, colored). Upon receipt of order, how soon can you ship me three (3) tubs, C. O. D. American express? An early reply will oblige. Resp'y, yours, C. E. McLaughlin."

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[33] A writ of error in this case was dismissed by the Supreme Court of the United States (144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450 [1892]), a majority of the court being of the opinion that no federal question was involved.

In State v. American Express Co., 118 Iowa, 447, 92 N. W. 66 (1902), certain considerations of public policy which give support to the doctrine of State v. O'Neil were emphasized.

The respondent on the same day answered as follows:

"Portland, Me., Dec. 14th, 1896. Mr. C. E. McLaughlin, Old Orchard—Dear Sir: Replying to your letter of Dec. 14th, quote you 3 40-lb. tubs butterine, 14c. If we receive your order at once, same will be shipped in car from Chicago, Thursday, arriving here a week from Monday. Yours, respectfully, H. B. Peters."

On the following day, McLaughlin wrote this letter to the Portland Beef Company:

"Old Orchard, Me., Dec. 15th, 1896. Portland Beef Co.—Gentlemen: You may ship me via American Express, C. O. D., as soon as possible, 3 40-pound tubs butterine (Lincoln flats, colored), same as I have been using, at 14c. Very resp'y, C. E. McLaughlin, Old Orchard."

Although McLaughlin's letters were dated "Old Orchard" for reasons of his own, they were in fact written and mailed at Augusta. To the last letter the respondent made no reply, but on December 24, 1896, he delivered the three tubs of butterine ordered to the American Express Company, at Portland, to be sent C. O. D. to McLaughlin, at Old Orchard. Subsequently, by direction of McLaughlin, with the consent of the respondent, the butterine in question was reshipped from Old Orchard to Augusta by the express company, and there delivered to McLaughlin upon payment of the price and the transportation charges.

It is contended on the part of the state that these transactions constituted a sale of the butterine at Augusta. It is strenuously claimed that the respondent's letter of December 14th was an offer or proposal to sell McLaughlin three 40-pound tubs of butterine at 14 cents a pound, and that McLaughlin's letter of December 15th, written and mailed at Augusta, was an acceptance of that offer. Hence it is argued that the sale was made at Augusta.

If the state is right in its premises, it is also right in its conclusion. If we regard the respondent's letter as an offer, the acceptance of that offer completed the trade, accomplished the sale, struck the bargain; and, in accordance with well-settled principles of law, such a sale would be deemed to have been made at Augusta, the place where the offer was accepted.

But the trouble with the position of the state is that the respondent's letter of December 14th cannot be considered as an offer or proposal. It was simply an answer to McLaughlin's letter of inquiry of the same date. McLaughlin asked for a quotation of prices, and how soon the butterine could be shipped on receipt of an order. The respondent gave the desired information,—nothing more. The most that can be said is that it contemplated a possible offer by McLaughlin to buy if the price and time of delivery were satisfactory. If, after this, the respondent had refused to fill McLaughlin's order of December 15th, he could not have been held liable for a breach of contract to sell. The letter of the respondent contained no undertaking whatever to sell. Howard v. Industrial School, 78 Me. 230, 3 Atl. 657; Smith v. Gowdy, 8 Allen (Mass.) 566.

In McLaughlin's letter of December 15th we find the first offer. It was an order,—an offer to buy. His proposition to buy was accepted by the respondent, by delivering the butterine ordered to the carrier designated by the consignee. This constituted the sale. The delivery was at Portland, and not at Augusta.

But the state contends that, taking the transaction as a whole, it is evident that the vendor did not intend to part with the title to the butterine until it was paid for by the consignee to the carrier; that from the fact that the butterine was shipped C. O. D., which means to "deliver upon payment of the charges due the seller for the price, and the carrier for the carriage of the goods" (State v. Intoxicating Liquors, 73 Me. 278), the jury would be authorized to find that the vendor reserved the jus disponendi until payment. And authorities to this effect are cited. But such is not the law in this state, in the absence of controlling circumstances; and there was nothing in the order, or in the acceptance and the shipment of the butterine in this case, to take it out of the general rule touching the shipment of goods on order C. O. D. The delivery to the carrier designated by the consignee was a delivery to the consignee, subject to the vendor's lien. The language of Mr. Chief Justice Peters in State v. Intoxicating Liquors, supra, is full and expressive upon this point: "The contract stands upon the simple rule of the common law. The seller was entitled to his price, and the buyer to his property, as concurrent acts. The title passed to the vendee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon a tender of the price, could sue for the property." We adhere to this rule.

It further appears that, after the butterine was shipped, the Portland Beef Company, represented by the respondent, attempted to attach it at Old Orchard, and did attach it at Augusta, after McLaughlin had paid the C. O. D. bill, to secure an old debt due from McLaughlin. From the evidence it is claimed that an inference may be legitimately drawn, and that the jury were authorized to find, that it was not the intention of the respondent to part with the title until the butterine was paid for; that the respondent shadowed the goods so that they could be attached as soon as they became the property of McLaughlin by payment. We think otherwise. The acts of the respondent in the attempt to secure the old bill show rather an intention to attach as soon as the vendor's lien was removed by payment. It would have been fruitless to attach before.

There is no evidence in the case which would warrant the jury in finding that the sale of the butterine took place at Augusta. The jury should have been so instructed, as requested by the respondent, in substance. The presiding judge declined to so instruct, and the jury were permitted to find that the sale did in fact take place in Augusta,—a finding which had no evidence to support it.

Exceptions sustained.

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## HUNTER BROS. MILLING CO. v. KRAMER BROS.

(Supreme Court of Kansas, 1905. 71 Kan. 468, 80 Pac. 963.)

Error from District Court, Sumner County; C. L. Swarts, Judge.

Action by the Hunter Bros. Milling Company against Kramer Bros. Judgment for defendants, and plaintiff brings error. Reversed.

Action brought by Hunter Bros. Milling Company to recover from Kramer Bros. $900 as damages for failure to deliver bran purchased from the defendants and paid for by the plaintiff. Hunter Bros. Milling Company was engaged in business in St. Louis, and on May 13, 1903, Kramer Bros., who were in the milling business at Wellington, Kan., sent the following telegraphic message in cypher, and when translated it read:

"Wellington, Kan., May 13, 1903. To Hunter Bros., St. Louis, Mo. We offer to sell you 1,200 sacks of bran for 74 cents per sack, delivered in St. Louis, and to be shipped in the month of May. Kramer Bros."

In response to this telegram Hunter Bros. sent the following message:

"St. Louis, Mo., May 13, 1903. To Kramer Bros., Wellington, Kansas. We offer to pay you 73 cents per hundred-pound sack of bran and 80 cents per hundred-pound sack of your best white middlings, delivered in East St. Louis in May. Answer by telegram immediately and send samples. Hunter Bros."

To this offer Kramer Bros. replied by wire:

"Wellington, Kan., May 13, 1903. To Hunter Bros., St. Louis, Mo. We accept your offer of 73 cents per hundred-pounds sacked bran, delivered in East St. Louis, May delivery, and will send you 1,600 sacks. Send instructions immediately. Kramer Bros."

In confirmation of their first telegram, Hunter Bros. sent the following letter:

"St. Louis, Mo., U. S. A., May 13, 1903. Messrs. Kramer Bros., Wellington, Kan.—Gentlemen: We have your telegram, 'Offer 1,200 sacks bran 74, East St. Louis, May shipment.' We wired you offering 73c. for bran 100s and 80c. for your white middlings, 100s, East St. Louis, for May shipment, and stated to send samples. We now await your reply. Yours truly, Hunter Bros."

Kramer Bros. also wrote a letter confirming their second telegram, stating:

"Wellington, Kan., 5–13–1903. Hunter Bros., St. Louis, Mo.—Gentlemen: By exchange of telegrams we confirm sale to you of

1,600 sacks of bran, May shipment, 73c. f. o. b. St. Louis. Please send shipping instructions as early as possible, and oblige, Yours truly, Kramer Bros."

Following the telegram of acceptance, Hunter Bros. wrote the following letter:

"St. Louis, Mo., U. S. A., May 13, 1903. Messrs. Kramer Bros., Wellington, Kan.—Dear Sirs: We have your telegram, 'Accept 73 sacked bran, 1,600 sacks. Send instructions immediately.' We mail you our stencil, mark each and every sack with same, load the cars 20 tons to each and bill care C. & A., East St. Louis. The sacks must be new. Do not forget to use the stencil. For your middlings, like your former make we can pay you 80c, East St. Louis. Yours truly, Hunter Bros."

Then followed this postal card:

"Office of Kramer Brothers, Ætna Mills. Wellington, Kan., May 16, 1903. Hunter Bros., St. Louis, Mo. We are in receipt of your valued order of 5–14–03 for 1600 sacks bran for St. Louis, Mo. We will enter order at once for shipment as directed. Please accept thanks. Very respectfully yours, Kramer Bros."

This was followed by a letter from Hunter Bros.:

"St. Louis, Mo., U. S. A., May 18, 1903. Messrs. Kramer Bros., Wellington, Kan.—Dear Sir: We have your postal of 16th. All our purchases are made, 'delivered East St. Louis.' Kindly bear this in mind. Yours truly, Hunter Bros. Milling Company."

Within a few days Kramer Bros. loaded and shipped to the Hunter Bros. Milling Company four cars of bran. When the bills of lading were received by the Hunter Bros. Milling Company, it remitted to Kramer Bros. the entire amount due on the four car loads. Only two car loads were received, and the remaining two appear to have been caught in the flood and the bran destroyed. In the meantime bran had greatly advanced in price, and this action was brought to recover the damages sustained by the failure to deliver the two cars of bran. After hearing the testimony offered on behalf of the plaintiff, the court sustained a demurrer thereto and gave judgment in favor of the defendants. The plaintiff alleges error.

JOHNSTON, C. J. (after stating the facts). The plaintiff bought and paid for four car loads of bran, only two of which it received. The defendants acknowledge that payment was made for the whole of the bran, and concede that one-half of it never reached the plaintiff. It was all sacked and shipped under the contract in accordance with plaintiff's directions, and the question in dispute is, who was the owner of the bran while it was in transit. If the plaintiff acquired the bran, and was the owner from the time the shipment was made at Wellington, it must bear the loss; but, on the other hand, if the bran was to be delivered at East St. Louis and title was not to pass until delivery there, the loss must be borne by the defendants, and the plaintiff was entitled to recover. The contract of the parties is contained in the telegrams and letters included in the statement. The intention of the parties necessarily governs in determining when the title passed. We must look to their correspondence to ascertain their intention with respect to the place of the delivery and the time of the passing of the title to the property. In the absence of a stipulation or of restrictions respecting the transfer of title, a sale of the property designed for shipment, and the delivery of the same to a carrier, consigned to the purchaser, will ordinarily constitute a delivery to the purchaser, and operate to transfer the title to him. If, under the contract, the seller is to deliver the things sold at a designated place, and receive payment on the delivery, the general rule is that the title will not pass until delivery is there made.

In this transaction the correspondence indicates with reasonable clearness that the defendants were to put the bran in sacks and lay it down in East St. Louis for a specified price. The telegraphic offer of plaintiff was, in effect, that if defendants would deliver bran in 100-pound sacks, without limiting the quantity, in East St. Louis, in May, the plaintiff would pay them at the rate of 73 cents per hundred. The offer was accepted in a telegram, which, as the witness translated it, specified a delivery in East St. Louis, and fixed the quantity sold at 1,600 sacks. In connection with the telegrams, the letters confirming them plainly contemplated a delivery by the defendants at East St. Louis. In the one written by defendants confirming the sale, after specifying the quantity sold, the time of shipment, and the price, there followed the expression "f. o. b. St. Louis."

Some complaint is made that the plaintiff was not permitted to show the meaning of the characters "f. o. b." Some of the courts have accepted proof as to the meaning of the letters when used by parties in a business contract, while others have deemed them to be in such general use in contracts of sale, and so well understood, that their meaning is a matter of common knowledge, and of which the courts must take notice. We are inclined to the view that in contracts of this character judicial knowledge may be taken of these characters, and that parol evidence is ordinarily not needed in their interpretation. If outside proof, however, was necessary, it appears that the court in one instance overruled an objection to this class of testimony, and allowed the interpretation given by the witness to stand. That interpretation conforms to the one which is generally understood in the business world, and that is "free on board," and as used in this contract would signify free on board the cars at St. Louis.

The contract for the sale of the bran then determined the quantity, the quality, the price, and the place of delivery, and showed that the delivery was to be made free on board the cars at St. Louis, and not at the place of shipment. If the contract, by its terms, had not expressly provided for a delivery of the bran by defendants at St. Louis, the fact that the defendants were to pay the freight and furnish the bran at St. Louis for a specified price, without cost to the plaintiff, would be some evidence tending to prove an agreement to deliver the bran at St. Louis, and that the sale was not complete until the delivery was made. In such case the railroad company would be deemed to be the agent of the defendants and not of the plaintiff.

Suit v. Woodhall, 113 Mass. 391, involved a contract for the sale of liquors, and there was testimony that the plaintiff, who was the seller, was to pay the freight to the place of destination and the trial court refused an instruction to the jury that, if they found the plaintiff was to pay the freight and deliver the property to defendants at their place of business, the sales were made there. The refusal to so instruct was held to be error, and the court remarked that: "Delivery to the carrier was a delivery to the defendants, if there was no agreement to the contrary. * * * But if the parties agreed that the goods were to be delivered in Lawrence, it would not be a completed sale until the delivery, and the laws of this state would apply to it." In another case the same court held that one who makes and sells an article to another, agreeing to deliver it at the place of business of the buyer, is liable for any injury or loss occurring in the transportation of it, although at the time of making the contract for the making of the article nothing was said about delivery. Taylor v. Cole, 111 Mass. 363.

In Brewing Association v. Nipp, 6 Kan. App. 730, 50 Pac. 956, it was held that "ordinarily a delivery of merchandise to the carrier is a delivery to the purchaser, but when the seller pays the freight the carrier is his agent, and the delivery is made at the place of its destination." In this case the defendants were to pay the freight to St. Louis, where the bran was to be delivered at a fixed price, without charge, cost, or expense to the plaintiff. The rule, as stated in 24 A. & E. Ency. of L. (2d Ed.) 1050, is as follows: "If, by the terms of the contract, the seller is required to send, or forward, or deliver the goods to the buyer the title and risk remain in the seller until the transportation is at an end or the goods are delivered in accordance with the contract, after which time the title is vested in the buyer." See, also, Bloyd v. Pollock, 27 W. Va. 75; Miller v. Seaman, 176 Pa. 291, 35 Atl. 134; Sheffield Furnace Co. v. Hull, 101 Ala. 446, 14 South. 672; Capehart v. Improvement Co., 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60; Murray v. Manufacturing Co. (City Ct. N. Y.) 11 N. Y. Supp. 734; Knapp Electrical Works v. New York Insulated Wire Co., 157 Ill. 456, 42 N. E. 147; Brewing Co. v. De France, 91 Iowa, 108, 58 N. W. 1087, 28 L. R. A. 386, 51 Am. St. Rep. 329; Weil v. Golden, 141 Mass. 364, 6 N. E. 229; Havens v. Grand Island Light & Fuel Co., 41 Neb. 153, 59 N. W. 681; A. Westman Mercantile Co. v. Park, 2 Colo. App. 545, 31 Pac. 945; 2 Benjamin on Sales, § 1040; Newmark on Sales, § 166.

There is some confusion in the testimony as to whether delivery was to be made in St. Louis or East St. Louis, but the statements made by the parties in the later communications, and the shipment of the bran to East St. Louis by defendants, show that the latter place was understood by both parties to be the place of delivery. Taking the correspondence and the circumstances developed by the testimony, it is manifest that defendants had not carried out their part of the contract of sale until delivery was made in East St. Louis, and that the title to the bran did not pass until it reached that place.

There was certainly evidence to take the case to the jury, and therefore the judgment sustaining the demurrer to plaintiff's evidence must be reversed, and the cause remanded for further proceedings. All the Justices concurring.[34]

# SECTION 8.—EFFECT OF ISSUE OF DOCUMENT OF TITLE AND OF NEGOTIATION OR TRANSFER THEREOF

## EVANS v. MARTLETT.

(Court of King's Bench, 1697. 1 Ld. Raym. 271.)

If goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost. But if the bill be special, to be delivered to A. to the use of B., B. ought to bring the action. But if the bill be general to A. and the invoice only shews, that they are upon the account of B., A. ought always to bring the action, for the property is in him, and B. has only a trust, per totam curiam. And per HOLT, Chief Justice, the consignee of a bill of lading has such a property as that he may assign it over. And SHOWER said, that it had been adjudged so in the Exchequer.

## WAIT v. BAKER.

(Court of Exchequer, 1848. 2 Exch. 1.)

Trover for 500 quarters of barley. Pleas, not guilty, and not possessed; upon which issue was joined.

At the trial, before Williams, J., at the last Spring Assizes for Somersetshire, the following facts appeared: The defendant, a cornfactor at Bristol, had occasional dealings with a person of the name of Lethbridge, who was also a corn-factor at Plymouth, and on the 5th of December, 1846, wrote to him the following letter:

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[34] See, also, United States v. Andrews, 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185 (1907); McNeal v. Braun, 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441 (1891), reported herein, post p. 320.

"I hear that the crop of barley in the south of Hampshire is good this year, and that at Kingsbridge the price is low, compared with the markets further eastward. If you are doing anything in the article this season, and can make me an offer of a cargo, I have no doubt but we may have a transaction. Let me hear from you in due course. Send me sample in letter, describing weight," &c.

To which Lethbridge wrote the following answer on the 9th of that month:

"I beg to inform you that I have not yet commenced buying barley in Kingsbridge market, farmers there standing out for 10s. a bag. After Saturday's market I will send you a sample and an offer, if possible."

On the 14th Lethbridge wrote the following letter to the defendant:

"I herewith hand you samples of common and chevalier barley of the neighbourhood of Kingsbridge, and will engage to sell you from 400 to 500 quarters f. o. b. barley at Kingsbridge, or neighbouring port, at 40s. per quarter common, and 42s. per quarter chevalier, in equal quantities for cash, on handing bills of lading, or acceptance at two months' date, adding interest at the rate of £5. per cent. per annum, subject to your reply by course of post."

On the 16th, the defendant returned the following reply:

"I beg to accept your offer of 250 quarters of chevalier barley, at 42s. per quarter, and 250 quarters common, at 40s. per quarter f. o. b., for cash payments, on receipt of bill of lading and invoice, or acceptance at two months' date, adding interest at the rate of £5. per cent. per annum, subject to your reply by course of post."

On the 18th Lethbridge wrote the defendant as follows:

"Your favour of the 16th came duly to hand, and note by it your acceptance of my offer of barley. I suppose I am to take up a vessel at the best possible freight I can get her for. Please instruct me in this, and say if for Bristol or any other port."

On the 19th, the defendant wrote in answer:

"I took it for granted that you would get a vessel for the barley I have bought of you f. o. b., and therefore did not instruct you to seek one. I trust that you will be particular to select a good ship, and at the lowest possible freight, for this port; and, above all, take care that the quality of the barley is fully equal to sample. A party who will take part of it, is extremely particular in these matters; and the samples are sealed and held in the custody of a third party. Please to advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

After some further correspondence respecting the amount of the freight, Lethbridge wrote on the 23d to the defendant:

"I now send you copy of charter-party of the Emerald, which vessel will sail for the port of loading to-day or to-morrow, and I will lose no time in getting her loaded."

The defendant, by letter dated the 24th, acknowledged the receipt of the charter-party (not under seal), which was dated on the 22d, and was in the name of Lethbridge, to load at Dartmouth, a portion to be filled up at Salcombe, to proceed to Bristol, or any other port.

On the 28th, Lethbridge wrote to the defendant:

"The Emerald will commence loading to-day. I hope to hand you bill of lading in the course of the week."

And again on the 1st of January, 1847:

"I hope to be able to send you invoice and bill of lading of Emerald on Tuesday or Wednesday."

And on the 6th of January he wrote to the defendant as follows:

"The Emerald is nearly loaded; expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you."

The vessel was loaded with common and chevalier barley; and on the 7th of January, Lethbridge received from the master the bill of lading of the cargo, which was therein expressed to be deliverable at Bristol to the order of Lethbridge or assigns, paying the freight as per charter. On the 8th, Lethbridge called upon the defendant at Bristol early in the morning, and left at his counting-house the invoice and an unindorsed bill of lading. At a subsequent part of the day, Lethbridge called again upon the defendant, when the defendant raised some objections to the quality of the cargo, and asserted that it was inferior to the samples: he also threatened he would take the cargo, but sue Lethbridge for eight shillings a quarter difference. After some further dispute upon the matter, the defendant offered Lethbridge the amount of the cargo in money, and said that he accepted the cargo. Lethbridge, however, refused to accept the money and to indorse the bill of lading to the defendant; but took the bill of lading from the counter and immediately proceeded to the plaintiffs', who were corn-factors, and had a house of business in the neighbourhood, and indorsed the bill of lading to them, and received an advance upon it. The market at that time had risen considerably. The Emerald arrived on the 16th, and on the 18th the defendant proceeded on board and claimed the cargo as the owner, and unshipped 1240 bushels of the barley, worth £422. 14s.; but the plaintiffs coming on board during the time the cargo was being unshipped, presented the bill of lading and obtained the rest of the cargo, and paid the captain the freight.

The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by the defendant. His Lordship thereupon directed a verdict to be entered for the plaintiffs for £422. 14s., reserving leave to the defendant to enter a verdict for him.

A rule to show cause having been obtained,

PARKE, B. I am of opinion that the rule in the present case ought to be discharged. It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered. By the original contract, therefore, no property passed; and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action—the action being for the recovery of the property—that, at some subsequent time, the property passed. It may be admitted, that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract.

In this case, it is said that the delivery of the goods on ship-board is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain of the vessel, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge, as he stipulates under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract, that, by the bill of lading, Lethbridge should retain control over the property. It seems to me to follow that the delivery of the 500 quarters to the captain, to be delivered to Lethbridge, is not the same as a delivery of 500 quarters to a common carrier by order of the consignee. The act of delivery, therefore, in the present case, did not pass the property. Then, what subsequent act do we find which had that effect?

It is admitted by the learned counsel for the defendant, that the property does not pass, unless there is a subsequent appropriation of the goods. The word appropriation may be understood in different senses. It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract; and the contract will show when the word is used in that sense. Or the word may mean, that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case. For the purpose of illustrating this position, suppose a carriage is ordered to be built at a coachmaker's, he may make any one he pleases, and, if it agree with the order, the party is bound to accept it. Now suppose that, at some period subsequent to the order, a further bargain is entered into between this party and the coachbuilder, by which it is agreed that a particular carriage shall be delivered. It would depend upon circumstances whether the property passes, or whether merely the original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage,—which, in the Roman law, was called obligatio certi corporis, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery; although the property, after the contract, remained at the risk of the vendee, and if lost without any fault in the vendor; the vendee, and not the vendor, was the sufferer. The law of England is different: here, property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it. "Appropriation" may also be used in another sense, and is the one in which Mr. Butt uses it on the present occasion; viz.: where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it.

It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. It is an appropriation in the first sense of the word only; the vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that, at the time when the unindorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. If that is so, the case remains, as to the question of property, exactly as it did after the original contract. There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by indorsing the bill of lading to the defendant; but there was nothing which amounted to an appropriation, in the sense of that term which alone would pass the property.

The result is, that, in this action of trover, the plaintiffs, claiming under Lethbridge by the indorsement of the bill of lading, are entitled to the property; and then Mr. Baker has his remedy against him for the non-fulfilment of his contract, which he certainly has not fulfilled.

Rule discharged.[35]

## MIRABITA v. IMPERIAL OTTOMAN BANK.

(Court of Appeals, 1878. L. R. 3 Exch. Div. 164.)

Appeal from the judgment of the Exchequer Division, in favour of the plaintiff on a special case stated by an arbitrator.

The plaintiff is a merchant carrying on business at Malta and Constantinople. The defendants are a banking company incorporated by a firman of the Sultan, and carrying on business at Constantinople with agencies at London and Larnaca.

On the 26th of June, 1873, a contract was made between the plaintiff and Phatsea & Pappa, a firm at Larnaca, for certain umber to be sold to and shipped for the plaintiff by Phatsea & Pappa at Larnaca.

On the 7th of July, 1873, the plaintiff wrote to Phatsea & Pappa stating that he would send ships on receiving advice of the quantity of umber ready for shipment, and also that the bills of lading must state that Phatsea & Pappa shipped the umber "by order and on account of the plaintiff."

On the 26th of August, 1873, Phatsea & Pappa had 600 tons of umber ready for delivery and shipment under the contract, and they chartered by order of the plaintiff and for his account a British ship, the Princess of Wales, then lying at Alexandria, to carry a cargo of such umber from Larnaca to London. The plaintiff approved of the charterparty. The Princess of Wales proceeded to Larnaca, where she took on board a cargo of 600 tons of umber. About the 9th of October the plaintiff sent £150. to Phatsea & Pappa for ship's advances, of which sum £70. was paid to the master.

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[35] A concurring opinion was delivered by Alderson, B.

In Turner v. Trustees, 6 Ex. 543 (1851), Patteson, J., said: "There is no doubt that a delivery of goods on board of the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case the vendors by the terms of the bill of lading made the cotton deliverable at Liverpool to their order or assigns; and there was not, therefore, a delivery of the cotton to the purchasers as owners, though there was a delivery on board their ship. The vendors still reserved to themselves, at the time of delivery to the captain, the jus disponendi of the goods, which he by signing the bill of lading acknowledged, and without which it may be assumed that the vendors would not have delivered them at all."

On the 9th of October the master signed four bills of lading for the cargo, which stated the goods to be shipped by Phatsea & Pappa, and to be delivered "to order or assigns." The bills of lading were given to Phatsea & Pappa.

On the 10th of October the Princess of Wales sailed from Larnaca, and on the 14th of October Phatsea & Pappa informed the plaintiff by telegram that the vessel had left with 600 tons on the 10th instant; that they would shortly receive bills of lading and draft at sixty days, and requesting them to insure the cargo. The plaintiff communicated with his son, F. Mirabita, trading in London as Mirabita Brothers, and through him effected an insurance on the cargo.

Phatsea & Pappa drew a bill of exchange for 280 Turkish liras on the plaintiff, and indorsed and handed it with the bills of lading to Corkji, from whom they had bought the umber which formed the cargo. Phatsea & Pappa had paid Corkji for the umber, and they handed them the bill of exchange by way of accommodation, to enable him to obtain an advance from the defendants and in anticipation of future supplies of umber.

Corkji discounted the bill of exchange at the Larnaca agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople, and given up to the plaintiff on payment by him of the bill of exchange at maturity.

The Larnaca agency forwarded the bill of exchange and bills of lading to their bank at Constantinople, Pappa having come to Constantinople and handed to the plaintiff the charterparty and invoice of the cargo, which stated that the same was "shipped by order and on account of the plaintiff." The defendants' bank at Constantinople presented the bill of exchange to the plaintiff for acceptance, but he declined to accept without receiving the bills of lading. The bill of exchange and the bills of lading were then returned to the Larnaca agency. The plaintiff afterwards offered to the defendants' bank at Constantinople to pay the bill of exchange before maturity on receipt of the bills of lading, but in consequence of the documents having been returned to Larnaca this offer could not be accepted.

It was then arranged between the plaintiff and Pappa that a new bill of exchange for £254. 11s. should be drawn by Phatsea & Pappa to the order of Corkji on Mirabita Brothers in London at two months' date, which should be substituted for the former bill for 280 Turkish liras, and notice of the agreement was given to the defendants' bank at Constantinople.

A new bill of exchange, dated the 9th of October, 1873, was, in accordance with the terms so agreed, drawn by Phatsea & Pappa and sent by them to Corkji, who handed it to the Larnaca agency, saying that it was to be sent with the bills of lading to London, where Mirabita Brothers would be ready to accept and pay the bill of exchange at maturity against delivery of bills of lading. The Larnaca agency accordingly gave up the first bill of exchange, and on the 20th of November, 1873, forwarded the bill for £254. 11s. to their agency in London, and directed them "to give up the bills of lading on payment of the inclosed bill of exchange."

At the time of making the agreement with the plaintiff for the drawing of the bill of exchange for £254. 11s., as already mentioned, it was doubtful whether the bills of lading would reach England before the arrival of the ship. Pappa thereupon gave the plaintiff a letter, addressed to the master of the Princess of Wales, to be used in case the ship should arrive in England before the bills of lading, which letter purported to authorize the master, if the bills of lading had not come to hand, to deliver the cargo to the plaintiff.

On the 3d of December the Princess of Wales reaches Gravesend, and was ordered to the Millwall Docks by F. Mirabita.

On the same day the bill of exchange for £254. 11s., together with the bills of lading, was delivered by post, and in the course of the day was left at the office of Mirabita Brothers, with the following note attached: "Bill of lading for Terra umber, weighing 600 tons, per Princess of Wales, to be given up against the payment of attached draft, £254. 11s., on Mirabita Brothers."

F. Mirabita returned the bill of exchange to the defendants' London agency, stating that he was ready to pay the bill at maturity, but he did not then accept it.

On the 8th of December the defendants' London agency gave orders to the ship's brokers to enter cargo in the name of the bank, and on the 12th the cargo was entered at the Custom House in the defendants' name; but the defendants took no other steps towards taking possession of the cargo till after the 20th of December.

On the 12th of December F. Mirabita called on the defendants, and offered to pay the bill and receive the bills of lading. The defendants' manager refused to accept payment, alleging that they had taken possession of the cargo and thereby had made themselves liable for freight. They had done nothing to take possession of the cargo or to make them liable for freight.

On the 18th of December F. Mirabita again offered to pay the bill of exchange and to give a guarantee for the freight. After some further negotiation the defendants landed the cargo, and after heavy charges for demurrage, landing, and other expenses had been incurred, sold the cargo in bulk, without any authority from the plaintiff or F. Mirabita, for a sum which was not sufficient to pay the amount of the bill of exchange, freight, and expenses. The cargo was worth more than the amount of the bill of exchange, freight, and expenses, and if the plaintiff had obtained possession of it he would have made a profit therefrom.

So far as it was a question for the jury, the arbitrator found as a fact that it was the intention of Phatsea & Pappa and of the plaintiff that the property in the cargo of umber should pass to the plaintiff upon its shipment on board the Princess of Wales, subject to a lien on the same for payment of the price; and their intention that the property in the cargo should be vested in the plaintiff continued from the time of shipment until the arrival of the ship in England.

The court is to be at liberty to draw inferences of fact, and to disregard the above finding, if a jury would not have been justified in coming to such a conclusion from the facts above stated. The question was whether the plaintiff is entitled to recover damages from the defendants for their dealing with the cargo as above mentioned.

Bramwell, L. J. This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the governing bargain between the plaintiff and Phatsea & Co., the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber, or bills of lading of them, until payment of the bill of exchange. No question arises as to the defendants' rights; for it was admitted, and properly admitted, that the defendants did wrong in refusing the amount of the bill, and selling the umber. On the other hand, there is no contract between the plaintiff and the defendants. So that in the result the case is reduced to this: When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, or right thereto, as to entitle him to maintain this action? It is argued that he had not, and the reason given is, that as the umber was not specific and ascertained, and as on shipment the shippers took a bill of lading to order, and gave an interest in it to Corkji, who transferred it to the defendants, no property passed; and for this a long series of authorities, beginning with Wait v. Baker, 2 Ex. 1, and ending with Ogg v. Shuter, 1 C. P. D. 47, is cited. It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a jus disponendi. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor.

This appears from Wait v. Baker, 2 Ex. 1, Gabarron v. Kreeft, Law Rep. 10 Ex. 274, and to some extent from Ellershaw v. Magniac, 6 Ex. 570. In the first case, Parke, B., expressly says that the vendee Baker could under the circumstances maintain an action against Lethbridge for having sold the barley to Wait. This property or power exists then; and therefore if the vendors of the umber had sold it to the defendants this action would not be maintainable. But in that case the defendants would have acquired a right, while, as I have said, it is admitted that no right in them can be relied on. I think it is not necessary to inquire whether what the shipper possesses is a property, strictly so called, in the goods, or a jus disponendi, because I think, whichever it is, the result must be the same, for the following reasons: That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the contract they are at his risk. If lost or damaged, he must bear the loss. If specially good, and above the average quality which the seller was bound to deliver, the benefit is the vendee's. If he pays the price, and the vendor receives it, not having transferred the property, nor created any right over it in another, the property vests. It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made; the defendants might have wrongfully withheld the bills of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether the vendor's right was a right of property or a jus disponendi; for whichever it was it was their intention that it should cease on the plaintiff's paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here.

There is nothing in the authorities inconsistent with this. The only case that may be thought to seem so is Wait v. Baker, 2 Ex. 1, where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession, to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he chose to exact. Parke, B., says: "There is no pretense for saying that Lethbridge agreed that the property should pass." "There was nothing that amounted to an appropriation, in the sense of that term, which alone would pass the property." "There was no agreement between the two parties that that specific cargo should become the property of the defendant," the vendee. Here all the evidence shews that there was such an agreement. The arbitrator says it existed in fact at the time of shipment, but the subsequent conduct of both parties shews it. What seems decisive is this: the plaintiff must have a right against some one; has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, and he has done everything he was bound to do, treating the altered agreement as governing. No action therefore would lie against him. It must then be the defendants who are in the wrong. I think they are, that the property was to pass on payment, and consequently on tender of payment, of the bill of exchange; that the bill of lading was handed the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange; that therefore the plaintiff can maintain this action, and the judgment should be affirmed.

I would add that I agree with the reasoning of my Brother Cleasby in the Court below; and I would further remark that I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the coming into operation of the Judicature Acts. Cotton, L. J., has favoured me with a perusal of his judgment, and I entirely agree with it.

Cotton, L. J. In this case the vendors on shipping the goods, the subject of the contract, took a bill of lading, requiring the delivery of the goods to be to their order, and dealt with that bill of lading in this way in order to secure payment of the bill of exchange which they then drew on the plaintiff. The bill of exchange was discounted with the defendants, and the bill of lading was transferred to them as security for the payment of the bill of exchange; this bill of exchange having been refused acceptance, a second bill of exchange was drawn and given in lieu of the first bill, upon the terms of the delivery of the bill of lading to the plaintiff upon payment of the second bill of exchange, and in so dealing with the bill of exchange the vendors intended that upon payment, the plaintiff, the purchaser, should obtain the goods, and they agreed, and, as far as they could, transferred to the purchaser their right to insist that on payment of the bill of exchange the bill of lading should be handed, over.

I mention those facts for the purpose of adding this: that the action was instituted before the passing of the Judicature Acts, and therefore it is simply to be dealt with as a legal question; and we cannot inquire here how far the plaintiff has the right in equity to insist that he occupies the same position as the vendors, and to insist that as against the pledgee of the bill of lading the plaintiff, as transferee of the right, has a good equitable title, even if he has not a legal title. In fact in the present case it simply turns on this question, whether the property in the goods in question has, under the circumstances, passed to the plaintiff.

Now I quite agree with the judgment of Bramwell, L. J., but as several cases were cited in the argument which it was contended were adverse to the ground of our decision, I think it better to state what I consider to be the principle of those decisions, and to point out how far that principle is applicable to such cases as this: Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in Wait v. Baker, 2 Ex. 1, Ellershaw v. Magniac, 6 Ex. 570, and Gabarron v. Kreeft, Law Rep. 10 Ex. 274, (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price.

So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in Turner v. Trustees of Liverpool Docks, 6 Ex. 543, 20 L. J. (Ex.) 393; Shepherd v. Harrison, Law Rep. 4 Q. B. 196; Ogg v. Shuter, 1 C. P. D. 47. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser.

Apply these principles to the present case. Pappa did not attempt to make use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract. He dealt with it only for the purpose of securing payment of the price. It is expressly stated in the special case that Mr. Corkji, who acted for Pappa, discounted the said bill of exchange at the agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople and given up to the plaintiff on payment of the bill of exchange at maturity.

Under these circumstances there was an appropriation by the vendors of the cargo subject only to payment of the price. This was tendered, and as it is conceded that the defendants were wrong in claiming anything more, the plaintiff, the purchaser, had done or offered to do all that was incumbent on him to make the appropriation absolute, and the property vested in him.

Brett, L. J., concurred that the judgment of the Exchequer Division must be affirmed.

Judgment affirmed.

## LOVELL v. ISIDORE NEWMAN & SON.

(Circuit Court of Appeals of the United States, 1912. 192 Fed. 753, 113 C. C. A. 39.)

Action by William S. Lovell, as trustee in bankruptcy of Knight, Yancey & Co., against Isidore Newman & Son and others, on a bond conditioned to pay the cash value of a certain cargo of cotton to the receivers or trustee of Knight, Yancey & Co., if it should be adjudged that they had title to the same. Certain Italian spinners, who claimed the cargo as purchasers from Knight, Yancey & Co., were permitted to intervene.[36]

Maxey, District Judge. * * * The transactions eventuating in the present litigation originated in contracts made December, 1909, and January, 1910, by the bankrupts, through their broker, Gavirati, with the spinners for the purchase and delivery of certain cotton. The validity of the contracts is not questioned. They called for the shipment by the bankrupts of specified quantities of cotton of specified grades under through bills of lading to Genoa. The cotton was to be shipped in January and February, 1910. Insurance and freight were to be paid by the bankrupts, and the spinners were to make payment of the cotton by means of drafts to be drawn on certain designated bankers. No cotton was shipped by the bankrupts during the months of January and February. They, however, drew drafts on the bankers designated in the contracts for the price of the cotton and attached certificates of insurance, invoices, and forged bills of lading purporting to have been issued by the railroad company.

By referring to the statement of the case, it will be seen that these bills of lading, concocted by John W. Knight as the managing partner of the firm, were issued pursuant to the directions of the contract, and that the bills, the drafts, the certificates of insurance, and the invoices identified the cotton purporting to have been shipped by certain marks composed of four letters. For example, one set of documents, including the draft, referred to cotton marked "TSST," and so with the others, each set denoting a like combination, but with different letters. It will be further noticed that there was a substantial correspondence in all of these documents, thus clearly showing that it was the deliberate purpose of the bankrupts to obtain money from the spinners by the fraudulent artifice thus devised. And this purpose was fully accomplished. The drafts were duly paid by the bankers of the spinners and the forged bills of lading were surrendered to the latter. The result was that the bankrupts obtained the money, and the spinners got the spurious bills of lading. In so far as the spinners and their bankers were concerned in the transaction, their conduct was perfectly honest and straightforward. Relying upon the good faith of the bankrupts, they acted upon the presumption that the bills of lading were genuine. They were ignorant of the fraud perpetrated upon them, and paid the drafts in the assurance that the cotton had been shipped in compliance with the terms of their contracts and as indicated in the bills of lading.

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[36] The statement of facts is abridged and part of the opinion is omitted.

What then occurred? After the bankrupts had received pay for the cotton supposed by the shippers to be en route to its destination, the bankrupts in March and April—from March 16th to April 11th—a few weeks only after it should have been shipped under their contracts, made shipment of 1,400 bales via the Cotoniera Steamship Line to Genoa. For these shipments genuine through bills of lading were obtained from the railroad company at Decatur and Selma, Ala., and the cotton was transported to New Orleans, and there delivered to and put aboard the steamship Ingelfingen of the Cotoniera Line. The cotton was delivered to the steamship and taken aboard prior to the date of the restraining order, to wit, May 3, 1910. In this connection a comparison of the forged with the genuine bills of lading will prove instructive. In both the cotton was to be shipped by the Cotoniera Line to Genoa. In both the marks of the cotton were identical. In both Gavirati, the broker, was to be notified. In both the same weights precisely were inserted. In both the forms used by the railroad company were similar, and the genuine bills were issued by the same agent whose name was used in the forged bills. It is evident there was a purpose to conform the genuine bills to those that were forged. What were the purpose and intent actuating the bankrupts? They knew that the forged bills had gone forward and were presumbably in the possession of the spinners, since the drafts had been paid and they had received the money. They knew that the genuine bills, so carefully designed to correspond with those that were spurious, would not be necessary to insure the delivery of the cotton to the spinners. And with this knowledge their plain purpose was to suppress the genuine bills and permit the cotton to proceed to its destination under the forged bills, and thus prevent exposure of the fraud with consequences disastrous to themselves. In view of these facts who were the real owners of the cotton?

It is insisted by the trustee that, since the genuine bills of lading were made to the order of the bankrupts, they retained the title to and the jus disponendi of the cotton. It is true that the bills were executed as claimed, and that they were indorsed in blank and delivered to the trustee on May 26th. But on April 16th the bills were all in possession of the bankrupts and unindorsed. The cotton had then, at the date last mentioned, been delivered to the railroad company under through bills of lading for transportation to Genoa. At that date in whom did the title reside? The trustee answers in the bankrupts by virtue of the bills of lading executed to their order and remaining in their possession. But we have seen that, while a bill of lading is strong evidence of an intention to reserve to the shipper the jus disponendi of the property, yet such intention is always open to explanation, although the bill may have passed into the hands of an innocent purchaser for value. In the present case there are no intervening rights of third parties; the contest being between the bankrupts and their trustee on the one hand and the spinners on the other. In the absence of the bankruptcy of the parties, what would have been the attitude of the bankrupts? Could they have recovered the cotton or its value from the spinners? They had once been paid full value, and it would be shocking to the sense of justice to suppose that they could have enforced a second payment. If parties by their own fraudulent conduct may be estopped, the application of the doctrine would effectually cut them off from asserting that they had not delivered the cotton in pursuance of their solemn contracts.

But we may go further. We are clearly of the opinion that, under the facts of this case, the delivery of the cotton to the carrier vested the ownership in the spinners, upon the theory that it was the intention of the bankrupts to appropriate it to the contracts. The court below properly so held in the following finding: "That by marking and shipping the cotton, as above set out, Knight, Yancey & Co. intended to appropriate and did appropriate it to the fulfillment of the eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the contracts."

The case of The Idaho, 93 U. S. 575, 23 L. Ed. 978, upon this question, is pertinent and material. To a proper understanding of the case it becomes necessary to insert the following lengthy excerpt from the opinion. At pages 581–583 of 93 U. S. (23 L. Ed. 978), it is said by the court: "Recurring, then, to the inquiry whether Porter & Co., to whose order the steamer delivered the 165 bales of cotton, were the true owners of the cotton, a brief statement of the evidence on which their title rests is necessary. It originated as follows: On the 1st of April, 1869, one J. C. Forbes obtained from the master of the brig Colson, then lying at New Orleans, a bill of lading for 139 bales of cotton, described by specified marks. The bill was indorsed, and forwarded by Forbes to Porter & Co., and drafts against it to a large amount were drawn upon them, which they accepted, credited, and paid on or before the 7th of the month. In fact, however, when the bill of lading was given, no such cotton had been received by the brig; but on the 5th of April the agent of Forbes bought 140 bales, then at the shipper's press, and directed them to be sent to the Colson, marked substantially as described in the bill of lading. These bales were accordingly delivered from the press to the brig on the 8th of April, and the first and second mate receipted for them. They were not actually taken on board, but they were deposited on the pier, at the usual and ordinary place for the receipt of freight by the Colson, and an additional bill of lading for one bale only was taken by Forbes, and by him indorsed and transmitted to Porter & Co., together with an invoice of the 140 bales corresponding with the bills of lading. The marks and numbers on the bales were the same as those mentioned in the bills of lading, excepting only that 35 were marked 'L' instead of 36, and 16 marked 'S' instead of 15. There was also a small difference in the aggregate weight. That the cotton thus delivered to the Colson was intended to fill the bills of lading, one of which had been previously given, is incontrovertible. They were so intended by the shipper. If not, why were they thus marked? And why was a bill of lading taken for 1 bale only, instead of 140; and why was the invoice of the whole number sent? Such, also, was plainly the understanding of the ship. The receipts of the mates, and the fact that the master gave a bill of lading for 1 bale marked 'S,' where there were 16 bales thus marked, leave this beyond a reasonable doubt. What then? Why, the 140 bales thus shipped became from the moment of shipment the property of Porter & Co., to whom the bills of lading were indorsed. It is not only the utterance of common honesty, but the declaration of judicial tribunals, that a delivery of goods to a ship corresponding in substance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery. At that instant it becomes evidence of the ownership of the goods. Thus in Rowley v. Bigelow, 12 Pick. [Mass.] 307 [23 Am. Dec. 607], it is said a bill of lading operates by way of estoppel against the master, and also against the shipper and indorser. 'The bill acknowledges the goods to be on board before the bill of lading is signed. But if, through inadvertence or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipper's own warehouse, * * * and afterwards they are placed on board, as and for the goods embraced in the bill of lading, as against the shipper and master the bill will operate on those goods by way of relation and estoppel.' Such is also the doctrine asserted in Halliday v. Hamilton, 11 Wall. 565 [20 L. Ed. 214], and it is in harmony with the general rules that regulate the transfer of personal property. We do not say that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail, over the master's bill, but, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods. The cotton delivered on the 8th of April on the pier for the Colson, and received by the mates of the brig, became, therefore, at the instant of its delivery, the property of Porter & Co., who were then the indorsees of the bills of lading. Its subsequent removal by Forbes to the Ladonia, either with or without the consent of the brig's officers, could not divert that ownership."

As in the Idaho Case, the delivery of the cotton to the Colson was intended to fill the bills of lading, although the delivery was made several days subsequent to the execution of the bills, so in the present case, where all the facts and circumstances are considered, the conclusion is evident that the bankrupts intended by the delivery of the cotton to the carrier to appropriate it to the contracts of the spinners. Indeed, any other conclusion would not only be inconsistent with the facts, but repugnant to the principles of common honesty and fair dealing as between merchant and merchant.

But it is contended by the trustee that the delivery was ineffective to pass title for the reason, among others, that there was no proof of assent on the part of the spinners. The contention is answered by the court in the case of Grove v. Brien, 8 How. 439 (12 L. Ed. 1142), where it is said: "In the absence of all evidence to the contrary in case of an absolute assignment of property by a debtor to his creditors for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it. This principle was recognized and applied by this court in the case of Tompkins v. Wheeler, 16 Pet. 106, 10 L. Ed. 903, and had been before in Brooks v. Marbury, 11 Wheat. 96, 6 L. Ed. 423. No expression of assent, the court say, of the person for whose benefit the assignment is made, is necessary to the vesting the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him."

There is nothing in the present record rebutting or tending to rebut such presumption in favor of the spinners. On the contrary, it appears that, when the temporary injunction was issued at the instance of the receivers, the steamship line promptly gave bond, by virtue of which the cotton was immediately transported under the bills of lading to Genoa for delivery to the spinners. In addition, upon the institution of the present suit by the trustee, the spinners filed their petition of intervention, in which it is insisted that they are the owners of the cotton, and were such owners prior to the date of the restraining order. In view of the circumstances of the case, the presumption must obtain that the spinners assented to the delivery of the cotton. If in such case assent of the spinners to the delivery of the cotton would be presumed, they would be equally presumed to have waived the time of the delivery as well as the failure of the bankrupts to have it insured. Certainly the bankrupts would not be in a position to deny there was a waiver, and in that respect the trustee can claim no right superior to that of the bankrupts themselves. While creditors are entitled to the protecting shield of the law, the rights of innocent purchasers are guarded and protected with equal jealousy.

Under some circumstances, the bankruptcy statutes clothe the trustee with power to set aside conveyances, good as between the bankrupt and a purchaser. But ordinarily, in the absence of fraud, or of a state statute declaring the conveyance void, or unless it contravenes some provision of the bankruptcy acts, a conveyance, based upon a valuable consideration and good as between the parties, will be permitted to stand. As to such a conveyance, and the spinners here stand in a similar category, the trustee occupies no better position than the bankrupt. He stands simply in the bankrupt's shoes. The principle has been clearly announced by the Supreme Court in the following cases: Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Zartman v. First National Bank, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418; York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. * * *

The cotton in question prior to the date that Knight, Yancey & Co. were adjudged bankrupts was the property of the spinners, and hence it could not have been lawfully transferred by the bankrupts, nor was it subject to levy and sale under judicial process against them.

Without special reference to the assignments of error, we have considered all material questions arising in the case, and for the reasons stated we are of the opinion that the judgment should be affirmed. So ordered.

## MOAKES v. NICHOLSON.

(Court of Common Pleas, 1865. 19 C. B. [N. S.] 290, 34 L. J. C. P. 273.)

In this case the plaintiff sought to recover damages for the conversion of a cargo of coal; and the following facts were proved at the trial:

On the 9th of December, 1864, at Hull, a person named Pope bought of a person named Josse a quantity of coal, and a great deal of evidence, oral and written, was given at the trial in order to shew the terms of the sale, the defendant contending that by the terms of this sale there was to be "payment in cash against bill of lading in the hands of Josse's agent in London," and that it was not the intention of the parties that the property in the goods should pass till payment. The coal at the time of the contract was lying undistinguished in a heap at Josse's yard, containing a much larger quantity than that contracted for, and it was to be shipped on board a vessel, which was chartered by Pope in his own name and on his own behalf, to carry it to London. On the 13th of December, whilst the whole or all but a very small portion of the coal was still undistinguished, Pope sold the coal he had contracted for to the plaintiff on the Coal Exchange in London. The plaintiff resold on the same day at a higher price, and before action had paid Pope. By the 19th of December the coal was shipped and the captain signed three bills of lading, stating the coal was to be delivered to "Pope or order" on being paid freight and demurrage as by charter-party. One only of these bills was stamped, and this Josse retained; the second, together with an invoice and a letter announcing the loading, was sent on the 19th of December to Pope who received them next day. Josse not being able to get his money from Pope, sent the stamped bill of lading to the defendant, his agent, with directions to stop the delivery of the coal, and the captain, under the defendant's directions, refused to deliver to those claiming through Pope, and the defendant himself took the cargo.

The jury found that the sale was for cash, and the learned Judge directed a verdict for the plaintiff, and gave the defendant leave to move to set this verdict aside and enter one for himself, on the grounds that on the facts admitted and proved the defendant was entitle to the verdict, that the defendant had a right to stop the coals in transitu, and that neither Pope nor the plaintiff had any right to the property and possession of the coals.

A rule nisi having been obtained pursuant to such leave, * * *

Earle, C. J. I am of opinion that this rule should be made absolute. The action is brought on the ground that the cargo had vested in Pope. The coals were sold by Josse to Pope, by Pope to Moakes (the plaintiff), and he again passes them on. One material point is, whether Moakes has a better title than his vendor Pope, and

I think he has no better title. The rule that a man shall not have a better title than his vendor is not universal because, for instance, there are cases where, if the goods be in possession of a man as ostensible owner, together with the document of title, he may be able to confer on a purchaser a better title than he has himself.

No such point, however, arises here, because at the time of the treaty between Josse and Pope the goods were unascertained; the treaty was that the property should not pass till the cash was paid, and, whilst the goods are so unascertained, Pope makes the contract with Moakes, who therefore is only in Pope's shoes. Then what, as between Josse and Pope, was the intention of the parties? The property in Josse cannot pass out of him unless there be a sale which passes it. Now Josse intended to retain the property till the cash was paid, and if so, the property did not pass; that was clearly the contract. The delivery on board ship had no effect. Even if the delivery had been to Pope, yet it might be only as a warehouseman.

As to the difficulty which has been raised about the bills of lading, and as to their allowing Pope to pass as owner, under certain circumstances, such a question might have arisen; but it does not arise here, because when the plaintiff bought the goods they were neither ascertained nor loaded, and therefore there could have been no such bills; and besides, the only stamped bill of lading was retained by Josse, and the effect of an unstamped bill of lading is well known.

Byles, J. I am of the same opinion. I had doubts at one time, because I thought that the goods were sold after they were on shipboard, and after the bills of lading were in Pope's hands; but it appears that at the time of the sale not only were the goods not on board, but they had not been distinguished; therefore no property passed then, and it is now clear from the decided cases that none passed at the time of shipment, because the shipment was not intended to be a delivery. The captain was a sort of supercargo, and (as the jury find) the property was not to pass till all the conditions were satisfied.

As to any representations by means of the documents, the plaintiff could not have been misled, for he bought before Pope had them.

Keating, J. I am of the same opinion. No doubt the means used by Josse to retain his property in and control over the goods were very slovenly, but it clearly was the intention that the property should not pass without the cash. The jury have found this, and their finding seems in accordance with the evidence. The means adopted were slovenly, for circumstances might have arisen which might have placed Josse in a precarious position. Because there was a stamp only on one of the bills of lading, he thought himself amply secured. Yet, if unstamped bills of lading had been produced to a subsequent purchaser in the market, the effect might have been to raise questions which might have jeopardized Josse's rights. It turns out, however, that the plaintiff contracted with Pope on the 13th of December, and it was not until the 19th of December that the goods were ascertained and shipped.

Rule absolute.

## ROBINSON v. POGUE.

(Supreme Court of Alabama, 1889. 86 Ala. 257, 5 South. 685.)

Appeal from Circuit Court, Montgomery County; John P. Hubbard, Judge.

Detinue by Pogue & Son against Robinson & Ledyard for tobacco sold by plaintiffs to Rushton & Co., and by Rushton & Co. to defendants. The defendants requested the court to charge: "(4) If the jury believe from the evidence that the tobacco was delivered to the railroad company, and the bill of lading was made consigning the goods to Rushton & Co., then the title to the goods passed by this delivery to Rushton & Co., although the bill of lading was sent to Simon & Bro., in the absence of proof that the contract of sale required the performance of something on the part of Rushton & Co. before the goods were delivered." The request was refused. Defendants appeal.

Somerville, J. The bill of sale from Rushton & Co. to Robinson & Ledyard, the appellants, bearing date December 16, 1885, and transferring to them the stock of merchandise of the vendors in absolute payment of a pre-existing debt, is the same instrument construed by us in the case of Robinson v. Fairbanks, 81 Ala. 132, 1 South. 552, and again in Robinson v. Levi, 81 Ala. 134, 1 South. 554. Upon a state of facts substantially the same as that appearing in the present record we then observed that there could be no question about the fact that the defendants, if the evidence was to be believed, "were bona fide purchasers of the goods for value, and without notice of any alleged defect in the title of Rushton & Co., just as fully as if they had paid the cash for them." No controversy was made upon the trial raising any question as to the correctness of this ruling. There are many assignments of error in the present record. We do not propose to notice any of these except such as are insisted on in the brief of appellants' counsel, the others appearing to be without merit.

The main contention here insisted on, and raised by the rulings of the circuit court, relates to the title acquired to the goods in controversy by Rushton & Co., the consignees of the plaintiffs. If the sale of the tobacco to them was completed by an actual or constructive delivery, and the intention of the vendors was that the title should unconditionally pass, then the appellants, Robinson & Ledyard, acquired a good title; otherwise not. The contract for the sale of the goods was made by Simon & Bro., of Montgomery, Ala., as agents of the plaintiffs. The shipment was made by railroad, and a bill of lading was taken, in which Rushton & Co. were named as the consignees. This bill of lading was mailed to Simon Bros., with a bill for the goods on which were written the words "Shipped to Rushton & Co., Montgomery, Ala." It was agreed between Rushton & Co. and Simon & Bro. that the latter were to "retain the bill of lading" until the goods were paid for, but there is no evidence that the goods themselves were to be retained until the price was paid. The evidence, on the contrary, tends to prove that the sale was made on credit, after closely inquiring into the financial status of the consignees. The tobacco was delivered by the railroad to the consignees, without the presentation of the bill of lading.

Where goods have been sold and are delivered by the vendor to a common carrier, consigned without reservation to the vendee, the question as to whether the title eo instanti passes to such consignee, depends upon the intention of the vendor, to be gathered from all the circumstances of the case. There is no doubt as to the correctness of the general rule that where the bill of lading shows a consignment by the vendor to the vendee, in ordinary form, and no other circumstance appears as to the intention, the prima facie legal presumption is that an unconditional delivery to the consignee is contemplated. But this presumption of fact may be rebutted by evidence showing a contrary intention. Jones v. Sims, 6 Port. 138, (1837;) Ezell v. English, 6 Port. 317; Emery v. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; 2 Amer. & Eng. Cyclop. Law. 242; People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Ostrander v. Brown, 15 Johns. (N. Y.) 39, 8 Am. Dec. 218, note; Express Co. v. Greenhalgh, 80 Ill. 68. The title of the goods is commonly retained in the consignor, by taking the bill of lading to his own order, or in blank, or by drawing on the consignees with the bill of lading attached to the draft, or other like procedure, indicating an intention to retain in himself a jus disponendi over the goods until the price is paid, or until the happening of some other contingency. McCormick v. Joseph, 77 Ala. 236; Chandler v. Sprague, 38 Am. Dec. 417–421, note; Bank v. Jones, 55 Am. Dec. 299, note; Dows v. Bank, 91 U. S. 618, 23 L. Ed. 214.

The delivery to the common carrier, in cases of the former class, is deemed prima facie a delivery to the consignee, not only when the consignment is made to a carrier named by the consignee, but also when made to some carrier in the usual course of trade, who thus becomes impliedly the agent of the consignee to receive and transport the goods at his risk, the sale thus becoming presumptively complete at the point of shipment, although the price is not to be paid until the goods reach their destination. Garbracht v. Com., 96 Pa. 449, 42 Am.

Rep. 550; Pilgreen v. State, 71 Ala. 368; Sarbecker v. State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624; Hausman v. Nye, 62 Ind. 485, 30 Am. Rep. 199. Hence it is commonly held that the consignee in a bill of lading, where there is no reservation of title by the consignor, has vested in him such a property in the goods as to authorize him to sue the carrier, in his own name, for their injury, loss, or recovery in trover, detinue, or other appropriate action. Chandler v. Sprague, 38 Am. Dec. 423, note; Potter v. Lansing, 3 Am. Dec. 310, 318, note; Ang. Carr. § 497; Griffith v. Ingledew, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444; Express Co. v. Armstead, 50 Ala. 351; Railroad Co. v. Williams, 54 Ala. 168.

Under these principles of law, the refusal of the fourth charge requested by the appellants was error. If the facts hypothesized in this charge were believed by the jury, the consignees could have recovered the goods from the railroad company. Hence their delivery without presentation of the bill of lading did not presumptively prejudice the rights of the consignees. The case presents no question whatever involving the rights of a transferee of the consignor, claiming an interest by purchase in the property as holder of the bill of lading. If the sale was on credit, and the goods were not to be retained until the price was paid, the mere retention of the bill of lading by the agent of the consignor would not prevent the sale from becoming complete.

We cannot perceive that the case is affected by Rushton & Co.'s declaration, made to Simon, before delivery of the goods by the railroad, that they did not want the goods, inasmuch as there was no evidence tending to show the assent of Simon & Bro., or their principals, the consignors, to release the consignees from the purchase, or to rescind the trade. It required the concurring assent of both contracting parties to rescind the trade, just as fully as it did originally to make it. Neither alone could do so. The evidence on this point was irrelevant, and should have been excluded.

The judgment is reversed, and the cause remanded.[37]

## GREENWOOD GROCERY CO. v. CANADIAN COUNTY MILL & ELEVATOR CO.

(Supreme Court of South Carolina, 1905. 72 S. C. 450, 52 S. E. 191, 2 L. R. A. [N. S.] 79, 110 Am. St. Rep. 627, 5 Ann. Cas. 261.)

Woods, J. The complaint in this cause is to recover damages for breach of a contract to deliver a car load of flour to the plaintiff. The defendant being a foreign corporation, an attachment was issued to obtain jurisdiction and under the warrant the flour was seized in the hands of the railroad company at Greenwood, S. C. The defendant moved to dissolve the attachment, on the ground that it appeared from the complaint and the affidavit the flour was the property of the plaintiff and not of the defendant, and hence the court was without jurisdiction. The motion was refused and defendant appeals.

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[37] See, also, Wigton v. Bowley, 130 Mass. 252 (1881).

The essential facts stated in the complaint and the affidavit are as follows: The defendant, Canadian County Mill & Elevator Company, a corporation resident in El Reno, Okl., contracted to sell and deliver to plaintiff, Greenwood Grocery Company, at Greenwood, in this state, 250 barrels of flour at $4.50 per barrel. The defendant consigned to the plaintiff the flour, and sent draft on plaintiff, with bill of lading attached, to the Bank of Greenwood, but the draft required payment for the flour at $5.50 per barrel, instead of $4.50, the contract price. Plaintiff tendered to the bank the contract price and demanded the bill of lading, but the bank refused to accept less than the full amount of defendant's draft, and, upon plaintiff's refusal to pay more than the contract price, withheld the bill of lading. Thereupon the plaintiff brought this action for damages, attaching the flour in the hands of the railroad. The defendant's position is that when the flour was delivered to the carrier consigned to the plaintiff, it ceased to be the property of the defendant, and became the property of the plaintiff, subject only to the right of stoppage in transitu, and that therefore the attachment must fall.

1. The general rule is that an attachment will not be dissolved, on the ground that the defendant has no title to the property, or that it is the property of the plaintiff. The defendant's lack of interest in the property would affect the title of the purchaser under the attachment, but not the validity of the process. Drake on Attachments, § 417. As said in Metts v. Insurance Company, 17 S. C. 120, 123: "The attachment is based on facts disconnected with the property, and it must stand or fall upon these facts." But it is manifest this reasoning does not apply where the court obtains jurisdiction of a nonresident by virtue of the attachment of his or its property in the state. In such case, the jurisdiction and the validity of the attachment depend upon the defendant having property in the state, and if this fact does not appear, it is fatal. 4 Cyc. 775. In this case the flour is the property in this state alleged to belong to defendant, and if the title to that has passed from the defendant to the plaintiff, the attachment should be dissolved.

2. The sole question, therefore, is whether by drawing on the plaintiff with the bill of lading attached to the draft and refusing to deliver the bill of lading without payment of the draft, the defendant retained title and right of possession of the property. The effect of a bill of lading issued by the carrier who is a third party, on the title to the property as between the consignor and consignee is a question of fact depending not only on the terms of the paper itself, but on the intention of the parties as expressed by their dealings with each other. 1

Benjamin on Sales, §§ 568, 579, 580; Emery v. Irving National Bank, 25 Ohio St. 360, 18 Am. Rep. 299; 24 A. & E. Enc. Law, 1066; Hobart v. Littlefield, 13 R. I. 341; Merchants' National Bank v. Bangs, 102 Mass. 291; Kentucky Refining Co. v. Globe Refining Co., 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468; Chandler v. Sprague, 38 Am. Dec. 418, note; 23 Eng. Rul. Cases, 383, note.

The fact that the bill of lading is taken, making the goods deliverable to the order of the vendor, who is himself the consignor, is very strong prima facie evidence that the vendor in delivering the goods to the carrier intended to reserve the title until payment of the purchase money; and when a draft for the price is drawn on the purchaser with such bill of lading attached, the title does not ordinarily pass to him until the draft is paid. Bank v. Rowan, 23 S. C. 339, 55 Am. Rep. 26; 1 Benjamin on Sales, § 567; Porter on Bills of Lading, § 482; Dows v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214; Kentucky Refining Co. v. Globe Refining Co., 104 Ky. 559, 47 S. W. 602, 42 L. R. A. 353, 84 Am. St. Rep. 468; Hopkins v. Cowen, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124; Emery v. Irving National Bank, 25 Ohio St. 360, 18 Am. Rep. 299; National Bank v. Crocker, 111 Mass. 167; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Farmers' & Merchants' National Bank v. Logan, 74 N. Y. 568; Lanfear v. Blossman, 1 La. Ann. 148, 45 Am. Dec. 76; Stollenwerck v. Thacher, 115 Mass. 224; Erwin v. Harris, 87 Ga. 333, 13 S. E. 513. But this presumption may be rebutted by other circumstances and previous dealing of the parties evidencing a different intention. Porter on Bills of Lading, § 485.

In this case, however, it seems by the terms of the bill of lading the goods were deliverable to the consignee. The presumption therefore was that the consignor intended the title to pass. Emery v. Irving National Bank, 25 Ohio St. 360, 18 Am. Rep. 299; 1 Benjamin on Sales, § 586. If, therefore, the railroad company had delivered the goods to the consignee without the surrender of the bill of lading and without notice of any reservation of title and possession, it would not be liable to the consignor, though he actually intended to reserve the title and possession until payment of his draft for the price. Bank v. Railway Co., 25 S. C. 224.

As between the vendor and purchaser, the authorities leave no room to doubt, however, that even if the bill of lading provides for delivery to the consignee, yet if the consignor draws for the price attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve the title and right of possession until the draft is paid, and the consignee is not entitled to the goods until payment. Emery v. Irving National Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Chandler v. Sprague, 38 Am. Dec. 419, note; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Cayuga County National Bank v. Daniels, 47 N. Y. 631; Marine Bank v. Wright, 48 N. Y. 1; Halsey

v. Warden, 25 Kan. 128; First National Bank of Green Bay v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92.

That the intention of the shipper as evidenced by his action in respect to the bill of lading is controlling, is supported by the elaborate opinions in Shepherd v. Harrison, 23 E. Rul. Cases, 349, especially the opinions of Kelly, C. B., and Lord Chelmsford. Here, according to the statement of the complaint and the affidavit, not only did the defendant, the consignor, express its intention to reserve the jus disponendi by presenting through a bank the draft with the bill of lading attached, but the plaintiff expressed this to be also its understanding of the contract by offering to pay the price, as it claimed it to be, as a condition precedent to acquiring possession of the bill of lading, and through it of the flour.

It is argued, however, that according to the complaint, which must be taken as true, the plaintiff tendered the real price agreed upon, and that by such tender he became entitled to the flour without respect to the amount of the draft. This argument is not without force, but it is not convincing nor is it sustained by authority. Even the important case of Mirabita v. Imperial Ottoman Bank, 3 Ex. Div. 164, cannot fairly be said to go to the extent of holding the buyer entitled to recover possession upon tender of any amount less than the draft. The question whether the right to possession would pass to the vendee upon tender of less than the amount called for by the draft if the less amount tendered be the true amount of the purchase money, did not arise and was not decided. There the draft for the purchase money with the bill of lading attached had been sent to the defendant bank, with instructions to deliver the bill of lading upon payment of the draft. The plaintiff tendered the full amount of the draft, and demanded the bill of lading. The bank refused to deliver it, claiming it had incurred freight charges which must also be paid, whereas it had done nothing to make itself liable for freight.

The case was, therefore, one in which it appeared the defendant bank, on its own responsibility, had refused to accept the full amount claimed by the vendor as expressed in the draft, upon payment of which the bill of lading was to be delivered to the vendee. Under these facts, the bank was held liable to the vendee. Lord Justice Cotton uses the following language: "So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in Turner v. Trustees of Liverpool Docks, 6 Ex. 543; 20 L. J. (Ex.) 393; Shepherd v. Harrison, Law Rep. 4 Q. B. 196; Ogg v. Shuter, 1 C. P. D. 47. But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs, there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and, in my opinion, under such circumstances, the property does on payment or tender of the price, pass to the purchaser."

From the context and the facts of the case, as hereinbefore stated, it is, we think, manifest that the court is referring to payment or tender of the price as expressed in the draft accompanying the bill of lading, and not some price which the vendee contends to be the true one, different from that expressed in the draft, upon payment of which the bill of lading was to be delivered. The defendant's argument on this point leaves out of view the principle that as between plaintiff and defendant in the circumstances here appearing, the flour was shipped on condition that the draft—not the amount claimed by the plaintiff as the true price—should be paid by the plaintiff before it should have the flour. Until the draft is paid or there is tender of the amount it calls for, the contract is executory, and while in some exceptional cases an executory contract for the sale of chattels may be enforced by an action for specific performance, the rule is that a buyer's action of claim and delivery to recover possession can be founded only on an executed contract of sale. 2 Benjamin on Sales, § 1305.

Even if the draft and bill of lading had been sent to the plaintiff itself under such conditions as exist here, it could not have retained the bill of lading, which was the symbol of the goods, without payment, or at least acceptance, of the draft. 1 Benjamin on Sales, § 570; 1 Daniel on Neg. Instruments, §§ 1734, 1734a–1734c; Tiedemann on Commercial Paper, § 494; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Cayuga County National Bank v. Daniels, 47 N. Y. 631; Marine Bank v. Wright, 48 N. Y. 1. It requires no argument to show that it is of the utmost importance to commerce that a bill of lading should have full effect as an instrument by which a vendor or shipper may retain his right of possession—jus disponendi—using it as a symbol of the property to express his intention as to the conditions upon which the property should be delivered. The courts of this country and of England have with practical unanimity given the bill of lading this force. But even if the defendant's view were correct, that the tender of the true price as stated by the plaintiff, without respect to the amount required by the draft accompanying the bill of lading, passed to the plaintiff the title and right to possession, the plaintiff would still have his election to sue for the property itself.

or for damages for breach of the contract in refusing to deliver the goods. 24 A. & E. Ency. Law, 1149, 1150.

On the facts as presented in the complaint and the affidavit, the defendant is prima facie the owner of the flour. The judgment of this court is that the judgment of the circuit court be affirmed.[38]

## FARMERS' & MECHANICS' NAT. BANK OF BUFFALO v. LOGAN.

(Court of Appeals of New York, 1878. 74 N. Y. 568.)

FOLGER, J. This is an action brought by the plaintiff to recover of the defendants the value of a canal-boat load of wheat, alleged to be the property of the plaintiff, and to have been taken by the defendants and converted to their own use.

The plaintiff recovered judgment against all of the defendants. The defendants, Logan and Preston, have appealed, and they contest the recovery. They did in fact take the wheat and ship it abroad for their own purposes and benefit. They bought it from the defendant Brown, at the Produce Exchange in New York city, and paid for it, all in the usual course of business of that mart. They did not see nor seek for any evidence of the title of Brown, or of his right to sell; nor was there any; save that the wheat was in his actual custody, by virtue of a special deposit of it with him in trust, and that he had and exhibited samples of it on 'change.

The wheat was first owned by one Perot, at Buffalo, N. Y. It was in an elevator there. Sears & Daw were commission merchants at that place. They acted, in the purchase of wheat for him, as correspondents and agents there of the defendant Brown, who resided and did business in New York city. At this time they had an order from him to buy two boat-loads of wheat. To fill that order they negotiated with Perot for the wheat in the elevator, and bought it for Brown. But they bought of Perot on their own credit, and they paid him for it with money obtained by them, as will appear further on. They took a bill of sale from Perot, which ran in their own name, to themselves. Perot knew not Brown in the transaction. The money with which the wheat was paid for to Perot was got by them in this way:

After the wheat was spouted from the elevator into a canal-boat, owned and navigated by persons not connected with the defendant Brown, the master of it made a bill of lading, stating the shipment of the wheat to be by them, as agents and forwarders, to New York, on account and order of the plaintiff, with a direction appended to notify Brown at that place. They then drew their own draft on Brown, to the official order of the plaintiff's cashier. That draft and the bill of lading, with a certificate of insurance of the wheat, were given to the plaintiff, which with notice of all the facts at that time existing, on the strength and security of those papers discounted the draft for Sears & Daw, and gave the avails thereof to them. They deposited the money thus obtained to their own credit, in the White's Bank, and paid Perot for the wheat by their own check to him thereon. The bill of lading and other papers were retained by the plaintiff. The draft was indorsed by it to its correspondent bank in New York city. The bill of lading and certificate of insurance were pinned to the draft. There was stamped upon the draft a direction to the correspondent bank to deliver the bill of lading and certificate to Brown, on his acceptance of the draft. There was stamped on the bill of lading a statement addressed to Brown, in purport that the wheat and the insurance of it were pledged to the plaintiff, as security for the payment of the draft; and that the wheat was put into his custody in trust for that purpose, not to be diverted to any other use until the draft was paid; and that upon his accepting and paying the draft the claim of the plaintiff would cease. The papers were sent to the correspondent bank in New York city, with instructions in conformity with the matter stamped upon the papers. The draft was presented to Brown and was accepted by him. The bill of lading was delivered to and kept by him. After that the wheat reached New York city; but before the maturity of the draft Brown procured samples of it, made the sale of it, and with money got from Logan & Preston by an advance on the price, paid the freight and other charges of the carrier. Logan & Preston received the wheat from the carrier and sent it abroad.

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[38] See, also, Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080 (1902).

These facts are sufficient to make application of what we conceive to be the law controlling the case.

There lies at the base of the matter an elementary principle of the common law well known and often stated, but which may be profitably repeated here, from a high source, as the foundation of our discussion. A purchaser of chattels takes them, as a general rule, subject to whatever may turn out to be infirmities in the title. A purchaser in market overt is an exception. But if not bought there, though the purchase be bona fide, the title got may not prevail against the owner. Again, where the owner has parted with the chattel to another, on a de facto contract, a purchaser from that other bona fide will obtain an indefeasible title. By a de facto contract is meant one which has purported to pass the property from the owner to another. See Cundy v. Lindsay, L. R., 3 App. Cas. 459.

In the case in hand there was not a purchase by the appellants in market overt, for such place and effect of sale is not recognized in this State. Wheelwright v. Depeyster, 1 Johns. 471–480, 3 Am. Dec. 345; Mowrey v. Walsh, 8 Cow. 238. The title set up by the appellants cannot prevail then, unless they purchased in good faith from the real owner, or from one to whom the real owner had parted with the goods on a de facto contract. The difference between the parties arises when the question is put, to whom did Perot, the acknowledged real owner at first, part with it thereby; to Brown, or to Sears & Daw?

The appellants claim that the contract of sale from Perot was to Brown; that he became the owner; that the wheat was indeed pledged to the plaintiff, but that Brown was the general owner and the pledgor; that when the plaintiff, being but a pledgee, put the possession of it in Brown, it lost its lien, as against a bona fide purchaser from him. So that the important inquiry is, who did, upon all the facts of the case, become the owner of the wheat, by the transaction with Perot? It is conceded to be the vital point in the case of the appellants that Brown, from whom they purchased, had a title of his own in the goods, which, subject to the lien of the plaintiff, he could transfer, and that the voluntary surrender of the possession to him by the plaintiff enabled him to make an effectual transfer of it, free from that lien.

It will not have escaped an observation of our recital of facts that Brown furnished no money nor any credit for the purchase from Perot. It was bought by Sears & Daw of him on their credit on his trust in them that they would pay for it. Nor was the draft discounted by the plaintiff on the credit of Brown. The bill of lading and the insurance upon the wheat were the security upon which the plaintiff rested. Sears & Daw remained liable until the draft was paid or they were discharged by some act of the plaintiff. Nor did Brown, when he ordered the purchase of the wheat, expect to furnish the money to pay the seller of it. He expected, and Sears & Daw expected, that the money would be got in the way in which it was got. Nor was there any act of Perot, or of Sears & Daw, in dealing with the wheat, which of itself passed the title to it to Brown. Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo, 60 N. Y. 40.

The bill of the sale from Perot was to Sears & Daw. The bill of lading from the carrier was not to Brown, it was to Sears & Daw, to the account and order of the plaintiff. The shipment is stated indeed to be by them as agents and forwarders. That phrase does not of itself point to Brown as the principal or consignee; and when understood, in knowledge of all the facts, does not declare or suggest his ownership of the wheat. In sooth, all the paper evidence, up to the time that the bill of lading went into the keeping of the plaintiff, gives no sign of ownership in Brown; but, on the contrary, does show ownership in Sears & Daw, transferred to no one, save it be the plaintiff. And the facts given by the oral testimony show the purpose to bar Brown from the right to control or dispose of the wheat until he paid the draft.

The case of Turner v. Trustees of the Liverpool Docks, 6 Exch. Wels., H. & G. 543, is pertinent. Merchants in Liverpool sent orders to merchants in Charleston to ship cotton on account of the former in their vessel, for her voyage to Liverpool. They in Charleston bought cotton and shipped it in that vessel. They took a bill of lading "to order or to our assigns," and indorsed it "deliver the within to The Bank of Liverpool or order." They drew drafts on the merchants in Liverpool, and delivered the bill of lading to a bank in Charleston, and on security of it sold the drafts to the bank, and used the avails to pay for the cotton, or to re-imburse themselves for advances therefor. They in Liverpool did not pay the bills. When the cotton reached that port the question arose to whom did the cotton belong? It was held that the property in it did not vest absolutely in them in Liverpool, notwithstanding the delivery of it on board their ship to their servant, the master; but that they in Charleston by the terms of the bill of lading had reserved to themselves a jus disponendi of the cotton, and that they had not divested themselves of their property in or possession of the goods; and that having bought the cotton with their own funds on their own credit, they retained their property in it until payment was made for it by the men in Liverpool. See in acc. The Frances, 9 Cranch, 183, 3 L. Ed. 698. There are facts in the case cited (6 Exch., supra) not stated by us, which make it a stronger case for the principals in Liverpool than the one in hand is for Brown. It was decided in the Exchequer Chamber after elaborate argument and full consideration. It has been since recognized and approved as sound and authoritative. See Mirabita v. Imp. Ottoman Bank, L. R., 3 Exch. Div. 164. The conclusion reached in it satisfies our judgment; the principle declared in it is sound, and applicable to and decisive of the point we are now considering.

When commercial correspondents on the order of a principal make a purchase of property ultimately for him but on their own credit, or with funds furnished or raised by them, and such course is contemplated when the order is given, they may retain the title in themselves until they are re-imbursed. One of the means by which this may be done is by taking the bill of sale in their own names, and when the property is shipped, by taking from the carrier a bill of lading in such terms as to show that they retain the power of control and disposition of it. This results necessarily from the nature of the transaction. It is not at once an irrevocable appropriation of the property to the principal. It rests for all of its efficiency and prospect of performance upon the intention to withhold and the withholding the right to the property, so that the right may be used to procure the money with which to pay. It contemplates no title in the principal until he has re-imbursed to his correspondents the price paid by them, or to the person with whom they have dealt the money obtained from him with which to pay that price. From the start the idea formed and nursed is that the property shall be the means of getting the money with which to pay for it, and that the title shall not pass to him who is to be the ultimate owner until he has repaid the money thus got.

Although such correspondents act as agents, and are set in motion by the principal who orders the purchase, yet their rights as against him in the property are more like those of a vendor against a vendee in a sale not wholly performed, where delivery and payment have not been made, and where delivery is dependent upon payment. And so in the case cited from 6 Exch., supra, such cases of vendor and vendee are looked to as authority, and e converso, that case is relied upon in L. T. Rep., 3 Exch. Div., supra, which was such a case of vendor and vendee. The rule laid down is, that the property remains in the shipper; or that he has a jus disponendi, a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with his first vendee; and that whichever it is, the result must be the same. Id. If the vendor when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser but on his own behalf, he thereby reserves to himself a power of disposing of the property, and consequently there is no final appropriation, and the property does not on shipment pass to the purchaser. Id. So if the vendor deals with or claims to retain the bill of lading in order to secure the contract price,. as when he sends it forward with a draft attached, and with directions that it is not to be delivered to the purchaser until payment of the draft, the appropriation is not absolute, and until payment or tender of the price is conditional only, and until then the property of the goods does not pass to the purchaser (Id.); and to this Turner v. Trustees, supra, is cited.

We see no principle which distinguishes the case of a vendor and a vendee in this respect, from that of a correspondent or agent buying for another, yet paying the price from his own means, or from moneys by agreement raised upon the property, or upon his own credit, and holding the property as security until the principal has made re-imbursement. Such is the purpose of the parties. There is no intent that the property shall be appropriated until payment is made. And unless third parties are unavoidably misled to their harm, they have no cause to complain of a purpose so reasonable and productive of so good results.

We think that the adjudications on this side of the water are to the same end. There have been repeated adjudications in this court whereby the legal effect of a bill of lading has been determined, when it contained some special clause or notation, or had upon it an indorsement which pointed out a particular person as the one on whose account the property named in it was to be carried and delivered. Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Dows v. Perrin, 16 N. Y. 325; Mechanics' & Traders' Bank v. Farmers' & Mechanics' Bank, 60 N. Y. 40; First Nat. Bank of Toledo v. Shaw, 61 N. Y. 283; s. c. on second appeal, 69 N. Y. 624; Marine Bank of Buffalo v. Fiske, 71 N. Y. 353; Bank of Commerce v. Bissell, 72 N. Y. 615. The bill of lading of goods thus affected prima facie confers upon the person in whose favor it is issued, or to whom it is transferred, the legal title to them. 4 N. Y. 497, 55 Am. Dec. 290, supra. That result is, though the transaction is not intended to give the permanent ownership, but to furnish a security for advances of money or discount of commercial paper, made upon the faith of it. Third persons dealing with property thus shipped, though acting in good faith, in the regular course of business, and paying value, are affected by the terms of the bill of lading, are bound to look into it, and are chargeable with a constructive notice of the contents of it. In the case in hand had the appellants asked for the bill of lading, and looked into it, they would have seen that the property described in it was in the possession of Brown, with a special and restricted right over it, and that they could not deal with it safely, until there had been a compliance with the condition attached to that possession. City Bank v. R., W. & O. R. Co., 44 N. Y. 136. And as they were chargeable with a constructive notice of the contents of it, there is the same legal result as if they had looked into it. Id.

We do not understand that the learned counsel for the appellants takes a position which he will admit is hostile to these adjudications. He seeks to distinguish the case at bar from those cited. He admits, as we understand him, that had this case stood alone upon the bill of lading, the defendants would have been properly cast in judgment. But he insists that Brown was the general owner of the wheat; that the plaintiff voluntarily put it into his possession; that being in his possession with its consent, he being general owner of it, the appellants were no longer bound to look into the bill of lading, and had not constructive notice of its contents. There is a subsidiary position that the plaintiff, having only a special property in the wheat as a pledgee, could not commit it to the possession of Brown, as he was the general owner and pledgor of it, without losing that special property to a bona fide purchaser from him.

It is seen at once that the important thing, in this contention, is that Brown was the general owner of the wheat; for on the existence of that depend both the propositions put forth. We think that we have shown that the idea of a general ownership in him is not consistent with the facts of this case, nor with the rules of law declared in like or analogous cases. To be sure, by his order to

Sears & Daw to purchase the wheat for him, he set on foot a course of action, which if carried out to the end, in the manner proposed and intended by all the parties to it, would have vested in him the general and unqualified ownership. But he never had the power over the wheat of a general owner. There was never a time that he had such dominion of it, as that he had the right to enjoy or do with it as he pleased, even to spoiling or destroying it; or that he had that right in it by which it belonged to him in particular, to the exclusion of all others. To constitute ownership, in the sense of that phrase as here used, there must be at some time a right as ample and unrestricted as that. When that right once exists, he who has it is a general owner. He may then burthen or limit that right, or subject it to rights created by him in others, and cease not to be the general owner. But he has not become the general owner, though he may have an interest in the property, until he has a right as great as that stated above.

We are asked, would not the profit have been Brown's had the wheat advanced in value, and the loss his, had it declined, or if it had been destroyed by fire? To which the ready answer is, whatever had chanced to it, it would not have been his, as between him and Sears & Daw and the plaintiff, until he complied with the conditions on which it was bought for him, that is to say, had accepted and paid the draft. As soon as he paid the draft, it would have been his, with whatever enhancement of value. Had it lessened in value or been burned up, he would still have been liable to Sears & Daw for the price of their services and for their expenses, and to the plaintiff, first, on his promise to accept the draft, and after acceptance on that obligation, to pay it. This position is noticed in Mirabita v. Imp. Ottoman Bank, supra; and while holding that the shipper may retain a power over the goods, it is declared that the vendee has an interest in them, that they are at his risk, and that the loss or benefit to them is his. This particular matter is treated of in Haille v. Smith, 1 B. & P. 563. There property was shipped by the owners of it, and the bill of lading, indorsed in blank, and the invoice, were sent to a mercantile house, under a previous agreement that it should receive, and hold and sell the property, and apply the avails for the benefit of a banking-house, to which the owners and consignors of the property were or were likely to be indebted. The point was there made that the risk was upon the consignors, up to the time of a sale, and that they had an insurable interest, and that they had a right to detain. The court held that the bill of lading operated as a change of the property; that by reason of the agreement from the moment that the goods were set apart for the particular purpose of securing the banking-house, there was a change of property; but as it was a change of property for the purpose only of applying the proceeds by way of indemnity, the circumstances of the risk, and of the profit and loss, referred to the trust with which the property was charged, and were accounted for thereby; and that that trust being that the proceeds should be applicable to the debt of the banking-house the risk must remain with the consignors, notwithstanding the change of property, and the consignors must suffer or be benefited by the loss or profit upon the sale.

It would seem that the principle thus announced is equally applicable to the facts in the case in hand, though they differ in some particulars. Here the wheat is bought by Sears & Daw for Brown, but on the instant, the property in it is by the bill of lading vested in the plaintiff, but as an indemnity, and charged with a trust that it be sold, if not paid for by Brown, and the avails applied to repay the advance made upon it. In analogy with the decision in the case cited, why is not the risk upon Brown, and the profit or the loss his, though he have not the property in the wheat? It cannot be successfully contended that until Brown paid the draft, he could have maintained an action for the delivery of the wheat, had the plaintiff retained it. He could not have shown that he ever had right to possession, or right to the dominion over it to the exclusion of all others. "So long as the advances were not paid, there was no theory whereby" Brown "could claim title. It had never been in" him. "At the moment his interest, whatever it was, accrued, it came burdened with the formal ownership of the plaintiff." Bank of Toledo v. Shaw, supra. Had Sears & Daw advanced the money as factors, in compliance with the order of their principal and giving him credit, the purchase would have been for him at once, and he would, at the instant, have become the owner of the thing bought. But the facts are far otherwise, and must not be lost sight of. At the outset, as one of the first steps in the process, the legal title was lodged in the plaintiff, not to leave it until the payment by Brown of the draft.

Thus the case is kept out of the law governing the relations of pledgor and pledgee. The plaintiff was not a pledgee of the property of Brown. It had a right to it, not the qualified and special property of one holding, as a security, a chattel belonging to another. It had the legal title, under an agreement to transfer it on payment being made; it "held the title in trust for" Brown, "after its own claim was satisfied." 61 N. Y. 283, supra. Nor does this conflict with Williams v. Littlefield, 12 Wend. 362. There the factor or agent bought on terms more favorable than he exacted of the principals; the variation he made was a departure from instructions and from the course of former dealing. Here, all that was done was in accord with previous understanding.

Such, it seems to us, is the result of the adjudications in this country. The basis of the opinion in 61 N. Y. 283, supra, is that the legal title to the property was in the bank, as assignee of the bill of lading.

It is well to notice here a distinction, that is attempted to be made, beween the case just cited and the one in hand. It is said that there there was an express agreement that the purchasing agent, or the discounting bank, should hold the property until the draft was paid. Such agreement was but putting into terms the legal effect of the transaction in the case before us. For we have shown, by authority, that the taking of the bill of lading in the name of the plaintiff, for its account, and the discount of the draft by it on the strength thereof, did transfer to it the title to the wheat. And in 61 N. Y. 283, supra, the agreement between the agents and the bank was like that here, that the draft should be drawn on the principal, and that the bill of lading be taken in the name of the bank as security for the payment.

Dows v. Nat. Exch. Bank, 91 U. S. 618, 23 L. Ed. 214, stands upon the same footing. The outset of the opinion in that case, states the only question to be, whether the ownership of the property had been divested before the conversion; and that the court has only to inquire to whom the wheat belonged when it came to the hands of Dows & Co. The opinion declares that the agents at Milwaukee, having purchased and paid for it with their own money, became the owners of it. This is placed upon the fact, that not being furnished with funds by their principals, they raised them in the way used by Sears & Daw.

It is said, in argument before us, that the position just stated was conceded by the counsel in that case, and the inference is then made here, that it was assumed by that court as the law of that case, without consideration or deliberate judgment, or as necessarily applicable to every case of like facts. We think that the position is stated by the court as the law of that case and of every case showing the same facts in that respect; though, as the proposition was not controverted by counsel, a bare statement was thought to be enough without discussion or elaboration. Nor is there meant by the term "ownership" only a special property, like that of a lienor or pledgee; it is put as "the absolute ownership," "the complete power of disposition." In this view, those cases are not applicable here which hold that a delivery to a vendee, even upon condition expressed at the time, will maintain a right in a bona fide purchaser from the vendee. Smith v. Lynes, 5 N. Y. 41, is an example of such cases. Ballard v. Burgett, 40 N. Y. 314, and Austin v. Dye, 46 N. Y. 500, show the distinction which exists; and the same appears in considering Rawls v. Deshler, *42 N. Y. 572, and M. & Traders' Bank v. F. & Mechanics' Bank, 60 N. Y. 40.

Hence there was no relation between the plaintiff and Brown of pledgee and pledgor; and hence no giving up by it, as pledgee, of the possession of property, held by it in pledge, to him while the general owner of it. It is not therefore needed that we consider whether, if such were the case, the special property or lien in it of the plaintiff was lost thereby.

Much stress is put upon the assumed fact that the right of the plaintiff in the wheat was a secret lien, and no more. Whether a lien merely or an ownership the declaration of the bill of lading, even with the modification thereof, made by the matter stamped upon it by the plaintiff, evinced to any one looking at it that Brown had no right or authority to dispose of the wheat until he had paid the draft. As it is conceded that possession merely, without title, in one assuming to sell, does not give title to his vendee, what is required of the vendee in such case, if it be not to examine the bill of lading or other evidence of title? And here an examination would have shown that Brown could not give good title. It is said that as the carrier could properly make delivery to Brown, the entire functions of the bill of lading were exhausted, when the wheat was transferred from out the canal-boat into the sea-going steamer. But that is not so, for by that transfer there was but a change of possession, and if possession merely did not give title, there was still something further to be looked for and required, and the terms of the bill of lading, even as modified, still stood in the way of a transfer of the absolute ownership of the wheat by Brown.

And we now come back to the elementary rule with which we started. It appears that there were infirmities in the title which the appellants got from Brown, or rather they got no title from him; for there had never been a contract de facto which purported to pass the property from the owner to him. All that the appellants had, upon which they had a right to rely, was the fact of possession of the wheat by Brown, and the purchase of it by them, in accordance with the usual course of business on the Produce Exchange. We doubt not that the latter makes very easy and rapid the transaction of an immense trade in the agricultural products of the country; and that it would tend much to the security and confidence with which it could be done if the law of market overt could be applied to it.

But such is not the rule of this State in the sale of chattel property, and we may not declare it so to be. The purchaser buys at his risk of the title, and if he would be safe, must make inquiry. He may not with certainty stop at the fact of possession, but must learn how the possession has been acquired. In every such case as this, the muniments of a real title are easy to be produced. When the property is, in fact, in the carrier's hands, the bill of lading will show to whom alone he has the right to deliver it. And if the directions of that document are relied upon, there cannot be much risk. A reliance upon it, and a prior inspection of it, may delay transactions, but they will protect all innocent and well-meaning parties and thwart seriously only those who mean to do wrong or are too reckless to try to do right. The appellants were not protected by the fact of possession in Brown, because possession alone does not give the power to pass a valid title. Hence when they bought of him they got no greater right than he had in the wheat. This need not be amplified or enforced, for the appellants concede that possession alone is not such evidence of ownership, or authority to sell, as that third persons have a right, as against the true owner, to rely thereon.

The appellants offered to prove on the trial an established course of business in the trade between Buffalo and New York in respect to transactions of the kind involved in this action. The court excluded the evidence, and the appellants excepted. We think that there was no error in that. The manner in which this transaction was to be carried out was determined by the papers which were made between the parties to it. If that manner differed from the established course of business, then that course was overridden by them. If it agreed with them then evidence of it would neither make nor mar.

The judgment appealed from should be affirmed. All concur except Rapallo, J., not voting.

Judgment affirmed.[39]

## OGLE v. ATKINSON et al.

(Court of Common Pleas, 1814. 5 Taunt. 759.)

Trover for a quantity of hemp and flax. The cause was tried before Mansfield, C. J., at the sittings after Michaelmas term, 1813, and a verdict was found for the plaintiff, subject to a case. In 1809, the plaintiff consigned wines to Smidt & Co. at Riga, for sale on his account, and next year ordered them to purchase for him the hemp and flax in question. In April 1810, the plaintiff sent his own ship, the Bremen Packet, to receive the goods so ordered. On her arrival at Riga, the captain received from Smidt & Co. the goods in question, with others, on behalf of the plaintiff, and as the plaintiff's own goods, which Smidt & Co. stated to the captain that they were. These goods not fully loading the ship, Smidt & Co. procured other goods to be shipped on freight: the captain, by agreement with the plaintiff, (his owner,) was to have £15. per cent. primage upon the ship's homeward freight, to be estimated as well upon the plaintiff's own goods as upon those which were actually to pay freight, the rate of which last was £10. per ton, but Smidt & Co. required the captain to estimate the freight upon the goods received for the plaintiff at £8. per ton only. The captain objected to this distinction, but Smidt & Co. insisting, that his owner was entitled, that the freight upon the goods belonging to the plaintiff should not be estimated at the same rate which the other goods were to pay, at length the captain consented. Before the ship left Riga, Smidt & Co. wrote a letter, without date, to the plaintiff, apprizing him of having shipped the hemp and flax in question by the Bremen Packet, and stating that they inclosed the bills of lading and invoices of that shipment, for which they debited the plaintiff's account, and requested that, being found right, the plaintiff would have them noted in conformity therewith. In that letter were inclosed four invoices, dated 18/30 June, expressing the flax to be shipped on board the Bremen Packet, for the account and risk of the plaintiff: and Smidt & Co., after enumerating all the charges on the cargo and ship, therein charged to the plaintiff a commission of two and a half per cent. on the amount of the goods and charges. In a letter of 15/27 June, they promised to furnish the plaintiff with the vouchers of the whole shipment; and in another, mentioned having before sent him the bill of lading and invoices of those shipments, performed on the plaintiff's account on board the Bremen Packet, and they annexed the duplicate of the vouchers. After the captain had received the goods, he was requested by Smidt & Co. to sign a bill of lading for them, deliverable to ——— or his order, for which he was to receive freight at the rates therein specified. The captain objected to sign the bills of lading with a blank for the name of the consignee, until Smidt & Co. assured him, that was of no consequence, as the goods were to be delivered to his owner, upon which he signed it.

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[39] See, also, Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818 (1887); Drexel v. Pease, 133 N. Y. 129, 30 N. E. 732 (1892). In the latter case the court said (133 N. Y. 136, 30 N. E. 734): "As stated in those cases, the doctrine is that where a commercial correspondent advances his own money or credit for a principal for the purchase of property for such principal, and takes the bills of lading in his own name, looking to the property as security for reimbursement, such correspondent becomes the owner of the property, instead of the pledgee, up to the moment when the original principal shall pay the purchase-price, and the correspondent occupies the position of an owner under a contract to sell and deliver when the purchase-price is paid. This doctrine is stated in Moors v. Kidder, 106 N. Y. 32 [12 N. E. 818], and founded upon the cases cited by Finch, J., in that case. Nothing therein gives color to the idea that the correspondent's ownership is of that character which would permit his exaction, even though agreed to by the principal, of a general lien upon the property for other and prior indebtedness of the principal as against one in the situation of St. Amant. The correspondent's position is one of ownership so far only as is necessary to secure him for the advances he made upon the merchandise described in the bill of lading, and in such a case as this he is bound to sell upon receipt of the purchase price from the principal, or in other words, upon receipt of the amount he advanced upon its credit. In no other sense is the correspondent the owner of the property."

The first mentioned letter to the plaintiff, which contained the invoices and bill of lading, was sent by Smidt & Co. to Lehr, their agent in this country, in a letter dated Riga, 4/16 June, wherein they stated, respecting the Bremen Packet, that they should make out Ogle's bills of lading to order, that in case of his not accepting the drafts, Ruckers might become possessors of the bills of lading; and after stating the amount of the goods loaded for the plaintiff, and charges, and that there would be very little of the proceeds of his wines remaining at his disposal, they added that they drew on him only £2500., which bills they remitted to Messrs. Ruckers. They conceived that sum to be the balance due to them, which the plaintiff disputed. In a letter of 2/14 July, Smidt & Co. instructed Lehr to take the necessary measure, that in case Smidt & Co.'s drafts of £1300. and £1200. at three months, drawn on the 4/16 June, were not accepted, he should otherwise dispose of the bills of lading he had in hand, and let Messrs. Ruckers receive the goods and dispose of them. Lehr, in pursuance of these instructions, called upon the plaintiff before the ship arrived, and delivered to him the letter inclosing the four invoices, and stated that Smidt & Co. had drawn two bills upon him the one for £1200., the other for £1300., which were in the hands of Messrs. Ruckers, and requested the plaintiff would accept them: the plaintiff refused, and Lehr in consequence indorsed the bill of lading to Messrs. Ruckers. On the ship's arrival in England, before any of the goods had been delivered to the plaintiff, Messrs. Ruckers claimed the goods as indorsees of the bill of lading, but the captain refused to deliver to them, and delivered the goods to the plaintiff, who deposited them with the defendants as warehousekeepers on his account. He had since demanded them back from the defendants, and tendered them the amount of their charges, but they had refused to deliver them. There was no tender of any freight for the goods. Smidt & Co. were alien enemies at the time of the shipment and trial. The plaintiff had obtained a license from the crown to import these goods, upon which license Smidt & Co. had, before the ship left Riga, indorsed, that the goods were shipped on British account. If the plaintiff were not entitled to recover the value of the goods so deposited with the defendants, a nonsuit was to be entered.

GIBBS, C. J. This is an action by Ogle against Atkinsons, into whose hands Ogle had delivered goods, brought for the purpose of recovering from them the value of the goods, which they refuse to redeliver, insisting that the property of the goods is in Smidt & Co., from whom they have had notice to detain them. There are two preliminary points made by the plaintiff; first, that the defendants cannot refuse to deliver up the goods to the plaintiff from whom they received them; but, if the property is in others, I think they may set up this defence. 2dly, it is said, Ogle has a lien for freight; he might have had such a lien, but if he wrongfully gets the goods into his hands on a claim of property, he cannot afterwards set up a lien for freight. This brings us to the true question, which is, in whom the property is vested. It is true, that the goods might have been delivered aboard the ship on the terms on which the defendant contends they were delivered: and if they had been, no doubt the plaintiff could not have obtained the goods, without accepting the bills; but were they so delivered? Smidt & Co., in their letter to Ogle, never make mention of any bills to be accepted by Ogle. No doubt, a delivery on board this ship was an absolute delivery to Ogle, unless qualified.

Does the case, therefore, state any such qualification? The case states that the captain received them as the plaintiff's own goods, which means his own goods absolutely; not with any qualification; and Smidt & Co. represent them to the captain to be the goods of Ogle, and as such they are delivered. If Smidt & Co. had said, we deliver the goods to you, to be the goods of Ogle, if he accepts certain bills, the defence would avail; but no such thing passes. I cannot annex to this delivery the qualification, that they are to be the plaintiff's own goods if he does certain things. The captain, then receives them as Ogle's absolutely. Is this state altered? The goods go on board: bills of lading are tendered to the captain to sign in blank: the captain objects. According to the defendant's argument, the answer should have been, I leave the bills in blank, because it is as yet uncertain to whom the bills may be deliverable, for that the cargo is to go to Rucker, unless the plaintiff accepts certain bills: but the answer given is, the blank in the bill is immaterial, for the goods are at all events to be delivered to your owner. If the blank was immaterial, it imported no alteration in the terms of the delivery; if it was material, a fraud was practised on the captain, which cannot avail the consignors.

I therefore think that the property of the goods entirely vested in the plaintiff, and that the subsequent acts of the consignors and their agents, cannot prevent him from recovering against the defendants: the judgment therefore must be for the plaintiff.

Judgment for the plaintiff.[40]

## BARBER v. MEYERSTEIN.

(House of Lords, 1870. L. R. 4 H. L. 317.)

This was an appeal, under the Common Law Procedure Act, 1854, against a decision of the Court of Exchequer Chamber, by which a previous decision of the Court of Common Pleas had been affirmed. Law Rep. 2 C. P. 38, 661.

The facts were these: In August, 1864, De Souza & Co., of Madras, shipped on board the Acastus 227 bales of cotton consigned for sale on commission to Azémar & Co., of London. There were three bills of lading making one set. They were in the usual form, except as to the last sentence, which concluded thus: "In witness whereof I, the said master of the said ship, have affirmed to three bills of lading, all of this time and date, one of which being accomplished, the others to stand void." In August, 1864, the vessel sailed for London. De Souza & Co. drew bills of exchange against this cotton upon Azémar & Co. for £3000., £1000., £1000., £1000., to fall due between the 12th of January, 1865, and the 22d of March, 1865. These bills were duly accepted by Azémar & Co., and were then, with the three bills of lading, deposited with the London branch of the Chartered Mercantile Bank of India. At the end of 1864, Azémar & Co. transferred their business, including the consignment by the Acastus, to one Abraham, who had formerly been in their employment.

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[40] Concurring opinions were delivered by Heath, Chambre, and Dallas, JJ.

The Acastus arrived in London on the 31st of January, 1865, and went into the St. Katherine's Docks. On the 2nd of February Abraham made an entry of the cargo at Cotton's Wharf (which is a public sufferance wharf) in the form given by one of the Customs Acts, the 16 & 17 Vict. c. 107, § 60.

The Sufferance Wharf Act, 11 & 12 Vict. c. xviii, contains (cl. 5) the following enactment, important for the consideration of this case, that "all goods which after the passing of this Act shall be landed at any of the public sufferance wharves aforesaid" (of which Cotton's Wharf was one), "from, or out of, any ship within the port of London, and lodged in the custody of the wharfinger for the time being in the occupation of such wharf, either at such wharf or elsewhere, shall, when so landed, continue and be subject to the same lien or claim for freight in favour of the master and owner of the ship from or out of which such goods shall be landed, or of any other person interested in the freight of the same goods, as such goods were subject to whilst the same were on board such ship, and before the landing thereof: and the said wharfinger, his servants and agents, are hereby required, on due notice in writing in that behalf given by such master or owner or other person aforesaid to the said wharfinger, &c., to detain such goods in the warehouse of the said wharfinger, &c., until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage rent and other charges to which the same shall have become subject and liable."

There were two "stops" lodged against this cotton from the Acastus, one by the Chartered Mercantile Bank of India, the other by the master for the freight. On the 9th of February Abraham instructed Barber & Co., as brokers, to sell the cotton, and they obtained from him an order, in virtue of which they were allowed to take samples. On the 4th of March Abraham gave a cheque which covered the sums due to the Chartered Mercantile Bank, and thereupon the bank delivered up to him the three parts of the bill of lading, and so put an end to the "stop" which had been lodged on account of the bank. On the same day he deposited with Meyerstein (with whom he had other transactions) one of the three parts of the bill of lading for the cotton by the Acastus, together with the original consignment to Azémar & Co., and thereupon Meyerstein gave to Abraham a cheque for £2500., which was duly paid. Meyerstein asked for the second part of the bill of lading, and received it. He did not, however, ask for the third part, believing that the third part was retained by the captain of the vessel.

Barber & Co. were wholly ignorant of these transactions, and on Monday, the 6th of March, Mr. C. Barber advanced to Abraham, by cheque, £1500. on the cotton by the Acastus, and on the next day, the 7th of March, made by cheque, a farther advance of £500. upon receiving the third of the set of bills of lading (which had been fraudulently kept by Abraham), and on being at the same time informed of the fact that the stop order for freight had been removed. On the 11th of March Meyerstein heard for the first time that the Barbers had been employed by Abraham to offer the cotton for sale. On that day they lodged their third copy of the bill of lading at the wharf. On the same day Meyerstein obtained from Abraham a letter addressed to Messrs. Barber, requesting them to pay over to him "the surplus net proceeds of the undermentioned goods, after satisfying the advances you have made us (Abraham & Co.) upon the same." Among the goods thus mentioned was the cotton by the Acastus.

Meyerstein, on receiving this note, struck his pen through this item, saying he did not want to have stolen goods transferred to him. He, however, forwarded the note to Messrs. Barber, and stated the fact of his making the advance of £2500., though the evidence left it doubtful whether he stated the exact date at which it had been made. On the same day Messrs. Barber wrote to Meyerstein: "We have this day received a letter from Messrs. Abraham & Co. requesting us to pay over to you the surplus net proceeds of 324 bales of cotton, as per memorandum at foot, which shall receive our attention in due course." This memorandum was a copy of that sent by Abraham, and the Acastus was struck out of it—the total number of bales in each case being only 324, while if those of the Acastus had been retained in the list there must have been 277 added to that number.

On the 13th of March the Barbers obtained from the wharfingers at Cotton's Wharf delivery warrants made out in their own names for the 277 bales of cotton, which they sold to different purchasers, who received them under the warrants delivered by the Barbers to them. The Barbers claimed to satisfy themselves in the first instance for their advances out of the proceeds of the sales. Meyerstein, who insisted that his claim took precedence of theirs, thereon brought his action against Barber & Co. The declaration was in the form of money had and received, with a count for wrongful conversion. The Defendants pleaded, never indebted, not guilty, and that the goods never were the Plaintiff's. Issue was taken on all these pleas.

At the trial, before Lord Chief Justice Erle, in June, 1866, he directed a verdict to be entered for the Plaintiff for the whole sum he claimed, reserving leave for the Defendants to move to enter a verdict for them. The rule was obtained, and was on argument, discharged. On appeal to the Exchequer Chamber, the judgment of the Court of Common Pleas was affirmed. This appeal was then brought.

The LORD CHANCELLOR (Lord HATHERLEY). In this case the House is called upon to reverse unanimous judgments of the Court of Common Pleas and of the Court of Exchequer Chamber. The effect of these judgments is this—to determine that, as to the Plaintiff, the indorsee for value of a bill of lading of goods which, at the time of its being indorsed to him, were landed at a sufferance wharf on the Thames, and were there subject to two stops put upon them (the one by the shipowner for freight, the other by certain mortgagees), the security so indorsed is available in preference to the claim of the Defendants, who, subsequently to such indorsement, obtained possession of the goods under the circumstances I am about to mention.

A bill of lading was drawn up in a set of three, and after the indorsement of the first two of the three to the Plaintiff had taken place, the consignee of the goods fraudulently retained the third, and obtained advances from the Defendants on the security, in the first place, of this third, and proceeded afterwards to the wharf where the goods had been deposited, and after the production of this third bill of lading obtained the removal of a stop which had been put upon the goods for freight. I should have before mentioned the previous removal on the part of the mortgagees (the directors of the Chartered Bank of India) of their stop in respect of their mortgage. Possession of the goods was, under those circumstances, obtained by the Defendants, the persons who, on receiving this third bill of lading thus fraudulently retained by the consignee, made to him an advance on the goods represented by this bill of lading.

The question has really turned upon one point, and I may almost say upon one point alone, namely, whether or not the bills of lading had fully performed their office, and were discharged and spent at the time that the Plaintiff took his security. Whether, in other words, the landing of those goods at the sufferance wharf in the name of the consignee, but subject to the stop which was put upon them by the shipowner, and the stop put upon them by the mortgagees, was, or was not, a delivery which had exhausted the whole effect of the bill of lading. That, I think, is the single point to which the case becomes reduced.

It appears to me, my Lords, that there are one or two points of law which must be taken to be clearly established, although very able efforts, employed with considerable ingenuity and resource, have been directed to the shaking of those well-established points of law. I refer particularly to the very able argument we have heard from Mr. Grantham in this case with reference to the first step, if I may so call it, in the proceeding, namely, the fact of the first assignment for value of a bill of lading when the goods are not landed, but are still at sea. Now, if anything could be supposed to be settled in mercantile law, I apprehend it would be this, that when goods are at sea the parting with the bill of lading, be it one bill out of a set of three, or be it one bill alone, is parting with the ownership of the goods.

Mr. Grantham has raised this argument upon the frame of the bill of lading itself, which I apprehend is in the common form where three bills are given. The form of the bill of lading to which he specially referred, and upon which he founded the argument I now advert to, in this, that the shipper undertakes to deliver these goods, the cotton, to the Souzas or order, or to their assigns, he or they paying the freight for the goods at the rate there mentioned; and then, at the end of the document we have these words, "In witness whereof I, the master of the ship, have affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others to stand void."

The argument has been this, that the bill of lading has not accomplished its office until not only the goods are landed, but the freight is paid, and the whole matter which is the subject of the contract of the shipowner has been achieved; and that, accordingly, if that be law, it follows that if one bill of lading be assigned while the ship is at sea, and a second bill of lading be assigned to a second person, fraudulently, of course, and a third bill of lading be assigned to a third person, also fraudulently, of course, it becomes simply a matter of expedition and race between the several parties who have taken those different assignments of the bills of lading; because until the goods have actually been landed and fully delivered, each bill of lading, according to the argument, is to be considered as of equal force until one of the bills has been, according to the argument, accomplished.

Now, I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases (which the learned counsel admitted to have been decided, and never yet to have been altered or reversed), if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would result from that state of facts. I apprehend that no decision can be found to the effect that any person taking an assignment of a bill of lading, knowing that others existed, is to be held to have been guilty of fraud simply from the fact of his so acting.

No authority, at all events, has been cited for that proposition. And no authority has been cited at the Bar to shew that the transaction is not entire and complete when once the bill of lading has been assigned, as respects, at all events, goods in transitu, whether the assignment be by mortgage or by sale. If it were by sale other considerations would intervene which would give still greater efficacy to the assignment of the goods without delivery or possession. But when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself. It appears to me that to shake any conclusion of that kind would be entirely to annihilate the course of mercantile procedure which has existed for a long period of time—far longer, probably, than I can at this moment accurately state.

That being so, the Judges have reasonably assumed that proposition as a point of undeniable law. Then, if the property so passes when the goods are at sea, the whole question resolves itself into this: What is the effect of the assignment of the bill of lading under the circumstances of this case, when the goods were not at sea at the time when the interest was passed, but were at a sufferance wharf in the name and by the order of the consignee, Abraham, who represented the original consignees, the Souzas, subject to the stop-order in respect of freight, and subject to the stop-order given to the chartered bank.

Now the circumstances are briefly these as to the dates: On the 4th of March, the goods being in the situation I have described, Abraham, the person who has been guilty of this fraud, not being then in possession of the bills of lading himself, inasmuch as all three were at that time in possession of the bankers, applies to the Plaintiff Meyerstein for a loan; he obtains money from Meyerstein; he first draws a cheque to meet the claim at the bank, a cheque provided for by the moneys advanced to him by Meyerstein, and then he obtains the three bills of lading from the bank. And on the same 4th of March, having these three bills of lading for a few minutes or a few hours in his possession, he does nothing with them in the way of claiming possession of the goods; he makes no use of them for that purpose, but he at once pledges two of these bills for value to Meyerstein. And that pledge being so completed, Meyerstein is in possession of these two bills with no other charge or claim whatever upon the goods they represented except the claim for freight, the freight being still unsatisfied. The mortgage had been cleared off, and he had become the owner of the property by this transaction, and he remained the owner subject to the payment of the freight.

Then afterwards, fraudulently, Abraham enters into farther dealings with his brokers. His brokers are aware that the goods have arrived. They obtain a partial order from Abraham, by which they are enabled to obtain a sample of the cotton in question; but they decline in the first instance to make him any advance. He proposes to obtain an advance on the bill of lading simpliciter, which they decline to make. But they were afterwards induced to make the advances when they had seen the goods themselves at the wharf, and when steps had been taken by Abraham for procuring money to enable him to discharge the stop which existed upon the goods for the freight. The stop which existed in respect of the mortgage had been already discharged, and the property, therefore, became apparently at his disposal. The Defendants, being ignorant of the transaction with Meyerstein, on the 11th of March obtained possession of the goods, and on the same 11th of March Meyerstein, for the first time, discovers the fraud which has been perpetrated upon himself. When he wishes to obtain possession of the goods he finds that they have been removed. And hence, of course, a contest arises between the two parties.

Then in that state of things the question that arises is this: The goods, it is urged, were at home when Abraham was empowered by the Act of Parliament to give directions that the goods should be placed on the wharf as the goods of him, the consignee. But, however, the question arises whether these goods could in truth be said then to be at home. It is said, at all events when for those few hours the three bills of lading were in possession of Abraham, and the goods were at home, as all the symbols of property were also in the hands of Abraham, therefore the symbol and the thing symbolised had become united, and that, in truth, the whole matter might be said to be disposed of. Now is it so? Can it be said that when for those few hours those documents were in the hands of Abraham, he had the control and proprietorship of the goods? Certainly when we first gave directions for their being warehoused in his name he was in no sense proprietor. He had neither the bills of lading, nor had he discharged the freight, nor had he in any other way put himself in a situation to entitle him to demand the goods.

But now, having the bills of lading, supposing he had been minded to go down to the wharf to demand the goods, what would have happened? He would have found a stop placed upon the goods for the freight. And what would have been his position? By virtue of the 5th clause of the particular local Act (11 & 12 Vict. c. xviii) referring to this subject, he would have found that he could not obtain any obedience to any delivery order which he might think proper to give, and that he could not obtain any warrant of delivery, because there had been placed upon the goods this stop for the freight. The Act expressly enacts that when a stoppage has been put at the right time, namely, before the issue of any warrant for delivery, or the acceptance of any order, then no wharfinger shall be authorized to issue any warrant, or to accept any order, for the delivery of any goods thus subject to a lien for freight. Accordingly, therefore, the goods would not have been delivered to him had he made use of those bills of lading instead of delivering them over to Meyerstein, and in that sense, undoubtedly, the goods were not at home as far as he was concerned.

Then, the first proposition of law being clear—that an indorsement of the bill of lading carries with it the property in the goods when the goods are at sea, the next proposition of law that we have to consider is this, laid down by all the Judges who have delivered their opinions in this case, and, as it appears to me, correctly laid down by them. It is stated by Mr. Justice Willes in his very elaborate judgment, in which he says: "I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it." Mr. Justice Keating says, in the same way, that he considers that "there can be no complete delivery of goods under a bill of lading until they have come to the hands of some person who has a right to the possession under it." And afterwards, in the Exchequer Chamber, Mr.

Baron Martin, putting the case on somewhat different grounds, says: "For many years past there have been two symbols of property in goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger the former remains the only symbol of property in the goods. When, therefore, Abraham delivered the bill of lading to the Plaintiff on the 4th of March, 1865, as a security for the advance then made to him, such delivery amounted to a valid pledge of the goods, and the Plaintiff thereby acquired a right to hold them as against Abraham and all persons claiming title thereto under him."

The principle seems to be the same, according to the view which Mr. Baron Martin takes, which is this: There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them. When they have arrived at the dock, until they are delivered to some person who has the right to hold them the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it.

It appears to me that is the legal sense of the transaction. The shipowner contracts that he will deliver the goods on the payment of freight. He discharges his contract when he delivers the goods. But, unless he chooses to waive his rights, he is not bound so to deliver the goods, or to hand them over to the person who is the original consignee to whom he has contracted to make the delivery, until all the conditions on which he contracted to deliver them are fulfilled. One of those conditions is, that the freight should be paid; and until the freight has been paid he is not bound to make the delivery.

Mr. Justice Willes explains what is the effect of these various Acts of Parliament. These Acts of Parliament are not intended to deprive the shipowner of the right which he has to say that he will not part with the possession of the goods until freight is paid. Accordingly, the local Act first enacted that there should be a power on the part of the shipowner to relieve himself from the responsibility, which might be extremely inconvenient to all parties, of keeping the goods on board, when either the consignee was not ascertained, or when, if ascertained, there was some laches on his part in demanding the delivery of the goods. In such a case the shipowner, by depositing them in a warehouse, placed them in such a condition that if their owner could not be ascertained the goods should be considered as if they were still at sea, in the absolute possession of the master to all intents and purposes. But if the owner of the goods could be ascertained, and the only question was the question of freight, still the Act of Parliament provided that the shipowner should be protected, that he should not be bound to hand over the goods absolutely, but that he should hand them over sub modo, with the full right of retaining his lien on the goods themselves, and with the right of preventing them being dealt with or removed until that lien should be satisfied.

The legal effect of the proceeding is this, that the proprietor or consignee may require the goods to be landed at a wharf, and to be warehoused in his name, but subject to this condition, that the shipowner still retains his interest in the cargo until his charge for freight has been defrayed. If he gives notice of that charge prior to any act being done by which the ownership of the goods is changed, prior to the acceptance of an order for delivery, and prior to the issue of a warrant for delivery, then the shipowner's lien holds and attaches itself to those goods, and the goods cannot be removed; the bills of lading cannot be considered as having been fully spent or exhausted, because there remains an important part of the contract unfulfilled on the part of the consignee, namely, payment of the freight in respect of which the contract was entered into.

That seems to me to be the whole basis of the judgment at which the learned Judges arrived in the Courts below, and which, as I before stated, was their unanimous conclusion. But against it several objections have been urged. It is said that a frightful amount of fraud may be perpetrated if persons are allowed to deal in this way with bills of lading drawn in sets, if you allow efficacy to be given to the first assignment of one of these bills, to the detriment of persons who may take, for value, subsequent assignments of the others. All that we can say is, that such has been the law hitherto, and that the consequences of the supposed evil, whatever they may be, have not been considered to be such as to counter-balance the great advantages and facilities afforded by the transfer of bills of lading. There is no authority or reason for holding that the person who first obtains the assignment of a bill of lading, and has given value for it, shall not acquire the legal ownership of the goods it represents. It seems to be required by the exigencies of mankind. It may be a satisfaction to be told by Mr. Justice Willes (though it is a matter upon which I put no reliance), that other nations concur with us in holding that (whatever inconveniences there may be attending it), the person who gets the first assignment for value is the person to be preferred.

The reasoning of the learned Judges in this case establishes clearly these two propositions: First, that the holder of the first assignment for value obtains a priority over those who obtain possession of the other bills. And, secondly (following the reasoning of Mr. Justice Willes), "The wharfinger under these circumstances was, at the lowest, the common agent for the shipowner and for the consignee or holder of the bill of lading—agent for the consignee or holder, upon his producing the bill of lading shewing that he was entitled to the goods, and upon his paying the freight, to transfer the goods into his name, and to deliver them to him, or give him a warrant for them—and agent for the shipowner to retain possession of the goods and to permit no one to exercise any control over them until the claim for freight had been satisfied. During this period, therefore, the bill of lading would not only, according to the usage, and for the satisfaction of the wharfinger that he was delivering to the right person, be a symbol of possession, and practically the key of the warehouse, but it would, so far at least as the shipowner was concerned, retain its full and complete operation as a bill of lading, there having been no complete delivery of possession of the goods." The other learned Judges take the same view; and I apprehend that the correct view in substance is this—that this being the possession of the wharfinger, the bill of lading remains in force so long as complete delivery and possession has not been given to some person having the right to claim such delivery and possession.

As to the argument founded on the possibility of fraud, I agree very much with one of the learned Judges, Mr. Justice Willes, who says, that as to any argument upon that subject, "all arguments founded upon the notion that the Court is to pronounce a judgment in this case which will protect those who deal with fraudulent people, are altogether beside the facts of this case, and foreign from transactions of this nature." I am afraid that the protection of parties against fraud is a matter of difficulty with which the Legislature must cope, as far as it can possibly do so, from time to time, when frauds of a serious character are practised; but the Courts of Law, which have to administer the law as it exists, cannot alter their course of proceeding because those who ought to do that which is right and just to their neighbours find means of defrauding them in spite of all the protection which the law may have thrown around the innocent holders of property. Judicature has no power to interfere with the course of proceeding in such cases. It must be left to the Legislature alone. But, on the other hand, we should consider that our mercantile laws, which are founded on long usage, have been found to work well for the general convenience of those engaged in those large adventures which are familiar to the enterprise of this country, and that although occasional inconvenience may have been caused by the fraudulent behavior of some parties, yet these laws have, upon the whole, been felt to operate beneficially.

The principles which, as I have stated, form the foundation of the judgment in the present case are, that the parting with the symbol of property the possession of which cannot be delivered is the parting with the property itself; and that persons who have not a complete ownership and possession of the property cannot be said to have such a title to that property as to divest the operation of the symbol to give a title to it, until something occurs which brings the symbol and the property itself into contact—and that for the purpose of so bringing the property and the symbol into contact, there must be a complete concurrence of title in the person who holds the symbol and the person who has the right to demand the property; and until that happens the symbol, as in the present case, has not exhausted its office.

I am, therefore, of opinion that the learned Judges have come to the right conclusion, and I have to move your Lordships to affirm the two decisions which are complained of in this appeal.[41]

## ANCHOR MILL CO. v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Iowa, 1897. 102 Iowa, 262, 71 N. W. 255.)

Prior to October 6, 1894, the Anchor Mill Company, of Cedar Rapids, Iowa, had contracted with the Lacey Grain Company of Sioux Falls, S. D., for the purchase of 4,000 bushels of wheat, which the latter company began shipping about September 1st, and on that day wrote to the plaintiff: "As cars of wheat are liable to arrive there ahead of draft, we inclose you an order on the agent to deliver you grain billed to us without presentation of bill of lading." The following is the order inclosed: "Sioux Falls, So. Dak., Sept. 1, 1894. Agent B., C. R. & N. Ry., Cedar Rapids, Iowa—Dear Sir: Please deliver all grain billed to us at Cedar Rapids, Iowa, to the Anchor Mill Co., without presentation of bill of lading. Yours, truly, The Lacey Grain Co." This order was filed with the agent of the defendant railroad company at Cedar Rapids, and the wheat, prior to that in controversy, delivered to the plaintiff in pursuance thereof.

The car load involved in this action arrived at Cedar Rapids October 5, 1894, at 5:10 p. m., and was placed by the defendant on the side track on Fourth avenue. Hershey, an employé of the defendant, whose duty it was to look after the cars, found this car on such track at about 7 a. m., October 6, and reported it there to Fox, chief clerk of the local freight department of defendant, who notified the plaintiff before 9 a. m. that the car had been placed on the side track for it. All cars of wheat were placed there at the request of plaintiff, as the most convenient place for unloading. On the 10th of October the defendant received notice from the Sioux Falls National Bank that it held the bill of lading, and claimed the wheat, and thereupon notified the plaintiff not to take it. The plaintiff, however, took a part of the wheat, and defendant then removed the car back to its yards.

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[41] Concurring opinions were delivered by Lords Chelmsford, Westbury, and Colonsay.

Plaintiff thereupon began this action, claiming to be the owner thereof. The wheat was shipped from Trosky, Minn., to the Lacey Grain Company, consignee, October 2, 1894. The bill of lading was in the usual form, and on the back was indorsed: "Deliver to Anchor Mill Co. The Lacey Grain Co." During banking hours, October 6, 1894, and about 2 p. m., the Sioux Falls National Bank bought a draft of $325 of the Lacey Grain Company, and the latter transferred to said bank by delivery the bill of lading of this car load of wheat. The bank filed its petition of intervention, claiming the wheat under such bill of lading. After all the evidence was introduced, the court, on motion of intervener, directed the jury to return a verdict finding the Sioux Falls National Bank entitled to the possession of the property in controversy, and afterwards rendered judgment on such verdict. Plaintiff appeals. Reversed.

LADD, J.[42] The main question to be determined in this case is whether the car load of wheat had been delivered to the plaintiff before the bill of lading was transferred to intervener. There is little or no conflict in the evidence. * * *

We think the delivery of the car load of wheat to the Anchor Mill Company was made before 9 a. m., October 6, 1894; and, having paid therefor, it became the absolute owner of the wheat so delivered before the purchase of the bill of lading by the intervener.

2. It is insisted by appellee that the wheat could only be delivered by transfer of the bill of lading. Garden Grove Bank v. Humeston & S. Ry. Co., 67 Iowa, 533, 25 N. W. 761, is relied on. That the bill of lading represents the property while being transported, and its assignment operates as a symbolical delivery thereof, cannot be doubted. Weyand v. Railway Co., 75 Iowa, 579, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504; Ayres, Weatherwax & Reed Co. v. Dorsey Produce Co., 101 Iowa, 141, 70 N. W. 111, 63 Am. St. Rep. 376. The bill of lading, however, is not a negotiable instrument, and its transfer carries with it only such interest in the property as the assignor might transfer by actual delivery. Certainly, the assignment of the bill of lading is not more effective in transferring title than manual change of possession.

The intervener obtained no better title to the wheat than the Lacey Grain Company had when it parted with the bill of lading. Haas v. Railroad Co., 81 Ga. 792, 7 S. E. 629; Tison v. Howard, 57 Ga. 410; Shaw v. Railroad Co., 101 U. S. 557, 25 L. Ed. 892. Prior to that time the railroad company had fully performed its duties as common carrier by delivering the wheat to the plaintiff in pursuance of the order of the consignee and the indorsement on the back of such bill. The title to the wheat had passed to the plaintiff, who had already paid for it. The bill of lading had served the purposes of its existence, and was no longer a thing of value. Such a rule only requires that the purchaser of a bill of lading know the title to the property of the person from whom he buys. This is the general rule, and we know of no reason for making an exception in favor of one claiming possession by constructive instead of actual delivery of property.

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[42] Part of the opinion is omitted.

It follows that the district court erred in directing a verdict in favor of the intervener, and its judgment must be reversed.

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## SHAW v. NORTH PENNSYLVANIA R. CO.

(Supreme Court of the United States, 1879. 101 U. S. 557, 25 L. Ed. 892.)

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On November 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Brother, of Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft—the original bill of lading still being attached thereto—to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of $8,500. Within a few days afterwards, the cotton, or rather that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill; but the court left it to the jury to determine—

1st, Whether there was any negligence of the plaintiff or its agents in parting with possession of the bill of lading.

2d, Whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The jury having found the first question in the negative and the second in the affirmative, further found "the value of the goods eloigned" to be $7,015.97, assessed the plaintiff's damages at that sum with costs, for which amount the court entered a judgment. Shaw & Esrey thereupon sued out this writ of error.

The remaining facts are stated in the opinion of the court.

Mr. JUSTICE STRONG.[43] The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in order words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

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[43] Part of the opinion is omitted.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both states enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; i. e., by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a bona fide holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defence which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a bona fide purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instruments in favor of bona fide holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer.

Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of mala fides will defeat his right. The rule is the same as that which protects the bona fide indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman v. Harvey, 4 Ad. & E. 870; Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Matthews v. Poythress, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (Miller v. Race, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in Peacock v. Rhodes (2 Doug. 633), to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand ad diem, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement.

No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in Goodman v. Harvey, Goodman v. Simonds, Murray v. Lardner (supra), and in Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402, is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a bona fide purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being. * * *

Judgment affirmed.

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## STOLLENWERCK et al. v. THACHER et al.

(Supreme Judicial Court of Massachusetts, 1874. 115 Mass. 224.)

Gray, C. J. This is an action of tort for the conversion of a number of bales of cotton. A verdict has been ordered for the plaintiffs, and the case reserved for the determination of the full court upon a report containing an abstract of the evidence given at the trial, and a number of letters and documents. But the facts material to the decision, assuming all the controverted ones to be according to the testimony introduced by the defendants, are not many; and a brief statement of them will tend greatly to narrow the discussion of the principles of law by which the case is governed.

The plaintiffs, being buyers of cotton in Mobile, made an arrangement with Joseph I. Baker, a cotton broker in Boston, by which they agree to pay him, upon such orders on them as he should obtain from his customers here, fifty cents a bale, out of their own commission of one and a half per cent., furnish him with types of their classification of cotton, and keep him advised at their own expense of the condition of the cotton market in Mobile; he agreed to procure and transmit the orders, and inform his customers of their acceptance or rejection; and the invoices were to be sent by the plaintiffs to, and the drafts for the price drawn upon, the customers, and the bills of lading attached to the drafts.

In pursuance of an order given him by Gorham Gray & Company, Baker telegraphed to the plaintiffs to buy for them two hundred bales of cotton. The plaintiffs replied, refusing to negotiate on any other basis than that the bill of lading should be attached to the draft. They bought the cotton in Mobile, drew a bill of exchange on Gray & Company against the cotton, took the bill of lading in their own name, indorsed it in blank, attached it to the bill of exchange, procured the latter to be discounted at a bank in Mobile, informed Baker of what they had done, and instructed him, on receiving the draft and bill of lading, to hold the bill of lading until the draft was paid. Baker by telegram and letter assented to all this. The invoice sent by the plaintiffs to Gray & Company showed that the cotton was consigned to the plaintiff's order. The Mobile Bank transmitted the draft, with the bill of lading attached, to a bank in Boston, which presented the draft to Gray & Company for acceptance.

Upon such presentment, Gray & Company asked for the bill of lading, and were told that Baker was to receive it. Gray & Company then accepted the draft, the bank delivered the bill of lading to Baker, and he afterwards delivered it to Gray & Company, who obtained the cotton from the carriers, gave them a check for the amount of the freight from Mobile to Boston, and pledged the cotton and delivered the bill of lading to the defendants as security for the payment of advances on the cotton. Gray testified that he accepted the draft upon Baker's assurance that he would hand him the bill of lading as soon as it came to Baker's possession, that Baker shortly afterwards delivered to him the bill of lading unconditionally, and that he transferred the cotton to the defendants believing that he owned it; and his testimony though contradicted by Baker's, must be assumed to be true for the purpose of deciding whether a verdict was rightly ordered for the plaintiffs.

Baker and the plaintiffs were not partners as between themselves, and Gray & Company did not deal with Baker as a partner of the plaintiffs. His relation to the plaintiffs was that of a broker only. He looked to them, and not to the cotton, for the payment of his commission. The case is not within Gen. Sts. c. 54. Gen. Sts. c. 54, § 2, provide that "every factor or other agent intrusted with the possession of merchandise, or a bill of lading consigning merchandise to him, for the purpose of sale, shall be deemed to be the true owner thereof so far as to give validity to any bona fide contract made by him with any other person for the sale of the whole or any part of such merchandise."

Baker was not a factor, or a general agent intrusted with the goods for the purpose of sale; but a special agent, with positive and restricted instructions to receive the bill of lading on the acceptance of the draft, hold the bill of lading and the cotton until the draft was paid, and then deliver them to Gray & Company. He had no right of possession of the bill of lading or the cotton for any other purpose, and no title in or lien on the cotton. This is not a case of stoppage in transitu. Gray & Company were not named in the bill of lading as consignees of the cotton, and the plaintiffs have never been divested of their property in the cotton as against Gray & Company or any persons claiming under them.

The numerous cases cited at the bar differ in their circumstances rather than in the statement of principles. A bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer thereof to a bona fide purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal. National Bank of Green Bay v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Gurney v. Behrend, 3 E. & B. 622, 632; Pease v. Gloahec, L. R. 1 P. C. 219, 228.

In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person, intrusted with goods merely for the purpose of collecting the price and then delivering them, to sell them on credit. The authority of Baker, being special and limited, could not be enlarged by his own declarations. Mussey v. Beecher, 3 Cush. 511.

It follows that Gray & Company, not having paid the draft, nor acquired possession of the bill of lading with the plaintiffs' consent, had no property in the goods, and could convey none to the defendants, so as to defeat the plaintiffs' title. The plaintiffs are therefore entitled to recover.

This is not an action in the nature of assumpsit for the proceeds of a sale of the property, in which the plaintiffs might be deemed to have waived any tort, and be obliged to submit to a deduction of the expenses of the sale by which such proceeds had been obtained. It is an action in the nature of trover for the conversion of the goods, in which the plaintiffs are entitled to recover their market value at the time of the conversion by the defendants, and are not obliged to allow a commission to Gray & Company for doing an act which is not shown to have been for the interest or according to the intent of the plaintiffs. Bartlett v. Bramhall, 3 Gray, 257.

But the amount paid by Gray & Company to discharge the lien which the carriers had against the plaintiffs for the freight on the cotton enured to the benefit of the plaintiffs, and should be deducted from the market value of the goods. Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Whitney v. Beckford, 105 Mass. 267. That amount must therefore, unless the parties agree upon it, be ascertained by an assessor, pursuant to the terms of the report, the verdict amended accordingly, and

Judgment rendered thereon for the plaintiffs.

## POLLARD v. REARDON.

## REARDON v. POLLARD.

(Circuit Court of Appeals of the United States, 1895. 65 Fed. 848, 13 C. C. A. 171.)

Appeals from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Reuben T. Pollard and others against Leverett Saltonstall, collector of the port of Boston, and Edmund Reardon, for the foreclosure of a chattel mortgage and an injunction. The circuit court rendered a decree for complainants. 56 Fed. 861. Defendant Reardon and complainants separately appealed from the decree.

In August, 1888, one N. B. Mansfield made a bill of sale to Pollard, Pettus & Co., of New York, of a quantity of hides then on the coast of Africa, and loaded, or about to be loaded, on a vessel for shipment to said Mansfield. The bill of sale was given as security for the renewal of a note of Mansfield's for $10,500, held by Pollard, Pettus & Co. In October, 1888, in consideration of the indorsement by one Edmund Reardon of a note for $8,000, Mansfield gave to Reardon a memorandum of sale of the hides, agreeing to deliver the bill of lading when received. In November, 1888, the bill of lading was received by Mansfield, and by him indorsed and delivered to Reardon. The note indorsed by Reardon was once renewed, and before the arrival of the hides the renewal note was protested, and paid by Reardon. On the 8th of April, 1889, the vessel carrying the hides arrived, and on the 16th of April a permit was issued to Reardon by the collector of customs to land the hides. April 17th, Pollard, Pettus & Co. demanded the hides from the collector, and immediately afterwards brought this suit to foreclose the chattel mortgage evidenced by their bill of sale, and to enjoin the delivery of the hides to Reardon. At the time of the institution of the suit there remained due on the note of Mansfield to Pollard, Pettus & Co. $3,334.30, but they claimed that the hides were conveyed to them as security also for a balance due to them from Mansfield on general account. The court found in their favor as to the balance due on the note only, and this they assigned as error.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The effect to be given to the negotiation of the bill of lading in this case does not seem to have been brought to the attention of the circuit court as it has been to ours. Bills of lading are not negotiable instruments in the full sense that promissory notes are, yet they are justly styled negotiable. Among the reasons for this are that they are well-recognized commercial instruments, that when indorsed in blank they carry title by mere delivery from hand to hand, and that the community gives credit in reliance on what appears on the face of them. Pollard v. Vinton, 105 U. S. 7, 8, 26 L. Ed. 998; Friedlander v. Railway Co., 130 U. S. 416, 424, 9 Sup. Ct. 570, 32 L. Ed. 991; Pease v. Gloahec, L. R. 1 P. C. 219, 227; 4 Daniel, Neg. Inst. (4th Ed.) § 1727. They have become by custom and necessity peculiarly subject to the rules stated by Lord Herschell in Bank v. Simmons, [1892] App. Cas. 201, 215, as follows: "The general rule of the law is that, where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner."

The peculiar form and phraseology of ordinary bills of lading, and the generally known reliance placed upon them and credit given them in commercial communities, render the principles of these expressions especially applicable to them; and common honesty, in the light of modern business and financial methods, throws a special burden on those who put them out. It is true, as said by the supreme court in the cases cited, that they are as so much cotton, grain, or corn, and that, as no sale of such articles, when lost or stolen, can divest ownership, the same is true as to sales of their lost or stolen symbols. In mere cases of theft or loss this is a clear rule; yet when there is no theft or loss, but a voluntary intrusting to an agent or other person, though for a special purpose, with no notice on the face of a limited right, the fact is then to be considered that there is an ostensible authorization found in the word "assigns," appearing in the usual bill of lading, and in the one at bar, which is neither found nor implied in a mere change or delivery or possession of the articles of which bills of lading are the symbols. The same may be said of a bill of lading which has been indorsed in blank; as, by analogy to other commercial instruments of a negotiable character, such an indorsement apparently authorizes the holder to fill up the blank at his option.

The application of the rules of estoppel to bills of lading like this at bar, appearing on their faces to be transferable in the light of the views and expressions which we have cited, would seem to be in harmony with legal principles. Nevertheless, the state of the authorities on this topic is not satisfactory. It must be admitted that the ordinary deposit of title papers does not enable the person holding them to make a title to personal property beyond what he himself possesses. The cases on this point are numerous. A marked one is Johnson v. Credit Lyonnais Co. (decided in 1877) 3 C. P. Div. 32, which touched the negotiability of certain dock warrants. Chief Justice Cockburn delivered the opinion, and said (page 40) that, at common law, the leaving in the vendor the possession of goods bought, or of the documents of title, would not estop the vendee in case of a fraudulent sale or pledge by the party with whom the goods or documents were left. It is evident, however, that, as the chief justice concurred in Rumball v. Bank, 2 Q. B. Div. 194, he had in view only the ordinary principle touching such matters, which may be distinguished from cases involving bills of lading negotiable in form.

Numerous cases may be found where it has been held that a factor who holds a bill of lading for sale cannot pledge; but in such cases either it appeared that there were grounds for charging the pledgee with knowledge of the factorship, or the decisions were made before the modern development of the doctrine of estoppel, or without giving it full consideration. The later English text-books, while laying down in general terms the proposition that a bill of lading is not negotiable in the full sense in which promissory notes are, do not seem to have come to the precise question upon which we must pass. Carv. Carr. by Sea (2d Ed.; published in 1892) p. 490, lays down the ordinary rule that possession of the bill of lading is only equivalent to that of the goods themselves; but the precise proposition in question here is not considered. The same may be said as to Benj. Sales (6th Ed.; published in 1892) p. 845. Scrutt. Charter Parties (3d Ed.; published in 1893) is no more definite; although on page 157 the author says that "the lawful holder of a bill of lading, in whom the property in the goods is vested, may, by indorsement, transfer a right greater than he himself has, for he transfers his position under the contract evidenced in the bill of lading."

Bank v. Henderson, L. R. 5 P. C. 501, is directly in point in favor of Reardon, if the transaction did in fact raise a trust attaching to the bill of lading, as the court assumed it did. Sir Barnes Peacock cites with apparent approval (page 512) from the judgment in Rodger v. The Comptoir d'Escompte de Paris, L. R. 2 P. C. 393, the following: "The general rule, so clearly stated and explained by Lord St. Leonards, is that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed; but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds. Doubtless the holder of an indorsed bill of lading may, in the course of commercial dealing, transfer a greater right than he himself has. The exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest."

None of the decisions of the supreme court is in point. In some of them the rule is recognized—so frequently stated—that a factor who holds a bill of lading for sale cannot pledge, but we do not find that that court has ever said that advances made to a factor holding a clean bill of lading by one not chargeable with knowledge of the factorship will not be protected. In Conard v. Insurance Co., 1 Pet. 386, the following appears on page 445 (7 L. Ed. 189): "By the well-settled principles of commercial law the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsements of the bill of lading to a bona fide purchaser for a valuable consideration, without notice of any adverse interest, the latter becomes, as against the world, the owner of the goods. This is the result of the principle that bills of lading are transferable by indorsement, and thus may pass the property. It matters not whether the consignee in such case be the buyer of the goods or the factor or agent of the owner. His transfer, in such a case, is equally capable of divesting the property of the owner and vesting it in the indorsee of the bill of lading. And, strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods." It is true that these expressions were not strictly in point. Nevertheless, they must be accepted as the unreserved opinion of the great jurist, Judge Story, who uttered them.

It may be claimed that the various factors acts, now law in several states and in England, constitute, by implication, legislative declarations that the holder of a bill of lading cannot vest a title better than his own. But these acts relate to a multitude of matters. It must be admitted that legislation was desirable to remove doubts, and settle the law touching questions of the class under discussion; and many statutes, modern as well as ancient, have, after all, been found to be only declaratory of the common law. The transactions in issue in this case related to merchandise on the coast of Africa, about to be shipped on the high seas, and were between residents of Massachusetts and residents of New York. They were, therefore, not directly controlled by legislation all of which is local, nor can this court be of necessity indirectly governed by any implications arising therefrom.

On the whole, the legal principles applicable seem clear, and, if the case involves any obscurity, we think it is because those principles have not been freely stated or applied. In the developments of commerce and commercial credits the bill of lading has come to represent the property, but with greater facility of negotiation, transfer, and delivery than the property itself. It is a negotiable instrument, even though not in the same sense as promissory notes or bills of exchange. It carries on its face, in the words "and assigns," an authority to dispose of it, and, as we have seen, a like authority when indorsed in blank, by which the person who voluntarily puts it out, or permits it to be put out, ought to be estopped. And it has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading thus holds out. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon.

When Pollard, Pettus & Co. accepted from Mansfield a bill of sale of the hides in question, they knew that in the regular course of business a clean bill of lading for them would issue to him, clothing him with the customary indicia of absolute ownership. They took the chances arising from this. They must stand as though they assented to it, and they can claim no right against any one who dealt with Mansfield in good faith relying upon it. Their presumed assent to the issue of the bill of lading to Mansfield is emphasized by their laches in applying for it. Whatever may be the nature of their right, it cannot prevail against Reardon's title under the bill of lading.

The law of stoppage in transitu admits the right of the purchaser of the cargo to stop it at any intermediate point, and transfer it by an actual delivery of it. Where the delivery is of the bill of lading, the point settled is that it is of the same effect as an actual delivery of the cargo. Therefore cases touching stoppage in transitu are considered to relate rather to the question of the effect of the negotiation of the bill of lading than to that of the apparent authority of the person holding it.

There is no question touching Reardon's bona fides. That his advances constituted a present consideration for value is sustained by Leask v. Scott, 2 Q. B. Div. 376. This case seems to be now regarded in England as settled law. When Reardon first made his advances he did it with a stipulation that the bill of lading should be delivered to him as soon as it arrived. Consequently the delivery of it to him on arrival, in connection with the prior stipulation, constituted in equity but one transaction. Moreover, while Mansfield was still apparently solvent, Reardon renewed his advances on the strength of it.

A question of jurisdiction has been suggested. It is, we think, without force. At the time the complainants below demanded the goods from the collector they had not in fact been delivered from his custody. Therefore, under the provisions of section 934 of the Revised Statutes (U. S. Comp. St. 1901, p. 689) they were irrepleviable, although subject to the orders and decrees of the courts of the United States having appropriate jurisdiction. There was no form of action at common law which would give complainants possession of them. A bill in equity was the only, and therefore an appropriate, method of proceeding therefor.

The bill in this case does not pray relief by the way of redeeming from Reardon, but merely demands possession of the goods, on the ground that the claim of Pollard, Pettus & Co., the complainants below, is prior to that of Reardon. Inasmuch as we find that Reardon has a prior claim, and a prior right of possession, no relief can be granted under this bill. Since it was filed, a stipulation was entered into between the parties in interest, by virtue of which the goods were delivered to Reardon without prejudice to the controversy involved in this suit. Therefore no further relief is asked for against the collector, and, on our conclusions, the complainants below were never entitled to any relief against him. By reason of the stipulation the collector had no occasion to take any share in this appeal, nor has he done so. He is therefore not entitled to any costs in this court. He, however, made a several defense in the circuit court, and properly did so.

The decree of the circuit court is reversed, and the case remanded to that court, with directions to enter a decree dismissing the bill, with full several costs in that court for Saltonstall, and with full several costs in this court and in that court for Reardon.

## COMMERCIAL BANK v. J. K. ARMSBY CO.

(Supreme Court of Georgia, 1904. 120 Ga. 74, 47 S. E. 589, 65 L. R. A. 443.)

CANDLER, J. The J. K. Armsby Company, an Illinois corporation, shipped to Walton & Carr, their brokers in Augusta, a quantity of salmon for distribution to different parties to whom the goods had been sold. Walton & Carr were merely agents of the Armsby Company, and had no right or title to the salmon. The goods were shipped from a point in Oregon, by parties from whom they had been ordered by the Armsby Company, on a through bill of lading to Augusta, and were consigned to the order of the consignor, with directions to notify Walton & Carr. The Armsby Company sent Walton & Carr a check for the amount of the freight, which was paid, and it also mailed them the original bill of lading, which was indorsed blank. Carr, a member of the firm of Walton & Carr, took the bill of lading to the Commercial Bank of Augusta, and hypothecated it for a loan of money. Shortly thereafter Walton & Carr failed, and the bank converted the salmon for the payment of its debt, whereupon the Armsby Company brought against it the present suit, which was an action of trover. The case was tried before the judge of the city court of Richmond county, without a jury.

The bank showed that it was the general custom of trade in Augusta that bills of lading "to order notify" were attached to drafts for the purchase price of the goods represented by them, that possession of the bill of lading could only be obtained by payment of the draft, that possession of such a bill of lading was considered prima facie evidence of ownership of the property for which it was issued, and that it was treated by banks as negotiable paper. It was also shown that the J. K. Armsby Company had done business in August for a number of years, and that, while Walton & Carr were merchandise brokers, they also bought and sold goods on their own account. It was admitted that neither the bank nor any of its officials knew or had reason to suspect that Carr had no right to convey the salmon, and that, in the event the bank should be held liable, the proper amount to be recovered was $700. The judge found in favor of the plaintiff, and rendered judgment in its favor for the amount mentioned. The defendant excepted.

"Where an owner has given to another such evidence of the right of selling his goods, as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title." Civ. Code, § 3539. The sole question for our determination, then, is, does a bill of lading of the character of the one involved in this suit constitute such an external indicium of the right of disposing of the property for which it was issued as to bring the case within the operation of the rule laid down in the Code section cited?

As a general rule, the transferee of a bill of lading can obtain no better title to the goods which it covers than that which was in the person by whom it was transferred. Indeed, it is a self-evident proposition that no man can convey that which he does not possess. But the true owner of property may, by placing it in the power of another to defraud innocent purchasers by an apparently valid transfer of the property, cut himself off from claiming it, and thereby divest the title from himself. In 4 Am. & Eng. Enc. L. (2d Ed.) 551, it is said that an important exception to the general rule which has already been stated "arises in the case of the transfer of a bill of lading to a bona fide purchaser for value by a consignee to whom the goods are by the terms of the instrument made deliverable, or to whom the consignor and original owner of the goods has indorsed and delivered the bill. It seems to be established that in this case the transfer defeats the vendor's right of stoppage in transitu, and passes the title to the goods to the bona fide transferee." See, also, 6 Cyc. 424; 1 Mechem, Sales, § 166; Pollard v. Reardan, 65 Fed. 848, 13 C. C. A. 171.

While a bill of lading is not in the full sense a negotiable instrument, it is treated by universal commercial usage as a symbol of the goods for which it is issued, and consequently it is in a measure negotiable. In Georgia it may be pledged as security for debt (Civ. Code 1895, § 2956), and a bona fide assignee for value is protected in his title against the owner's right of stoppage in transitu (Civ. Code 1895, § 3553). In American Nat. Bank v. Georgia R. Co., 96 Ga. 665, 23 S. E. 898, 51 Am. St. Rep. 155, the status of bills of lading under our law is discussed with considerable fullness; and, while the decision in that case is not directly in point on the question involved in the case at bar, the reasoning of Mr. Chief Justice Simmons has an important bearing thereon. The following language from the opinion of Mr. Justice Miller in the case of McNeil v. Hill, Woolw. 96, Fed. Cas. No. 8,914, is there quoted with approval: "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent, invention of like character, for the transfer, without the cumbersome and often impossible operations of actual delivery, of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are sui generis. From long use and trade they have come to have among commercial men a well understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale."

In this case there was no dispute as to the general custom of trade in regard to bills of lading of the character of the one negotiated by Carr with the Commercial Bank. It was the daily practice of banks in Augusta and elsewhere to advance money on such security, for possession of the bill of lading was regarded as prima facie evidence of the title of the holder to the goods of which the bill was the symbol. Ordinarily bills of lading of this kind are attached to drafts for the purchase price of the goods, and can only be obtained by payment of the drafts. Carr's possession of the bill of lading was therefore prima facie evidence that he had paid a draft drawn by the consignor, and was entitled to the property. The departure of the Armsby Company from this custom placed it in the power of Carr to commit a fraud on the bank, an opportunity of which he seems to have promptly availed himself. Applying the well-known rule that, where one of two innocent persons must suffer from the wrong of another, the burden should be borne by him who placed it in the power of the wrongdoer to perpetrate the fraud, we fail to see how it can be held that the plaintiff can recover.

The Georgia cases cited by counsel for the defendant in error do not, in our opinion, conflict with what is here laid down. The case of Tison v. Howard, 57 Ga. 410, which is more nearly in point than any of the other cases cited, is easily distinguishable from the case at bar. There the owner of the goods received from the transportation company duplicate bills of lading, both of which he indorsed in blank; sending the original to his factor, and depositing the duplicate in a bank for safe-keeping, and for no other purpose. The bailee bank indorsed the duplicate bill of lading, and secured from the factor an amount of money in excess of the value of the goods. The court held, in effect, that a bill of lading is not, in the full sense, a negotiable instrument, and that, the deposit of the bill with the bank being purely a bailment for safe-keeping, the virtual theft of it by the banker did not deprive the true owner of the goods of his title.

In the case now under consideration no such state of facts is made to appear. The Armsby Company forwarded to Walton & Carr a bill of lading, the possession of which, under the universal custom of business, gave a prima facie right to the disposal of the goods for which it was issued. The purpose for which the instrument was confided to Walton & Carr does not definitely appear from the record, but there is nothing to indicate that it was merely intrusted to them for safe-keeping. There was nothing to put the bank on notice that title to the property was in any one other than the holder of the bill of lading. A fraud was committed by Carr, by means of which he obtained from the bank a large sum of money. To say nothing of the provisions of section 3539 of the Civil Code of 1895, the plainest principles of equity require that the Armsby Company, which made the commission of the fraud possible, and not the bank, should bear the loss.

Judgment reversed. All the Justices concur, except Lamar, J., disqualified.[44]

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[44] By section 31 of the proposed Bills of Lading Act, which was approved by the Commissioners on Uniform State Laws in 1909, it is provided that "a negotiable bill may be negotiated by any person in possession of the same however such possession may have been acquired, if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery." Compare Sales Act, § 32. And see article by Professor Burdick, "A Revival of Codification," 10 Columbia Law Rev. 118, 124.

## MOORE v. LOUISIANA NAT. BANK.

(Supreme Court of Louisiana, 1892. 44 La. Ann. 99, 10 South. 407, 32 Am. St. Rep. 332.)

Breaux, J. This is an action by plaintiffs, a firm in Philadelphia, against the defendant, to recover the value of 50 barrels of whisky, sold by them to Oppenheimer & Co. The latter directed the plaintiffs to draw on them, payable in New Orleans, at one day's sight, for the purchase price. The whisky was in a bonded warehouse, for which plaintiffs held certificates. They drew on the purchasers, and attached their warehouse receipts, indorsed by them, to the bill, which was handed to the First National Bank of Philadelphia, which sent it, with the receipts, to the defendant for collection. The letter was brief, and did not notify the collecting agents to retain the receipts on acceptance of the draft. In compliance with usage, the draft was left with the drawees for examination. It was returned by them with their acceptance, and they retained the warehouse receipts. The acceptors sold these receipts. The draft was returned by the collecting agent to the Philadelphia bank, unpaid.

Plaintiffs allege that the illegal delivery of the warehouse certificates by the defendant enabled the drawees to perpetrate a fraud upon their rights. Testimony was admitted for the purpose of proving the local usage and custom of collecting banks in matter of retaining or delivering, after the acceptance, of drafts, bills of lading, or warehouse certificates attached. Two of the witnesses, cashiers, testified that it is the custom of business houses to surrender all evidences of ownership annexed to the draft, immediately after its acceptance, unless instruction is given not to deliver them before its payment. Three other witnesses, also cashiers, testify that their respective banks would not deliver the warehouse certificates or bills of lading attached, on the acceptance of the draft, unless so instructed by the party by whom sent.

The sale had been agreed upon. The remaining conditions to perfect it were the acceptance of the draft by the drawee, and the transfer of the thing sold into the possession of the buyer. The seller is bound to deliver the thing which he sells, whether sold for cash or on credit; in case of non-delivery, the seller is liable to damages if any be thereby occasioned. The term given for payment will not release the vendor from his obligation, unless since the sale the buyer has become a bankrupt, or is in a state of insolvency.

The insolvency of the drawees, at the time of the acceptance of the drafts, is not an issue of the case. The allegation and the proof do not raise that question. It is the duty of the collecting agent, immediately after receiving a bill for collection, to take the steps necessary to its prompt acceptance, and, if the instrument be not accepted, he must take the necessary step to fix the liability of the drawee. If he fails, he becomes liable.

In order to obtain the acceptance of the drawee, should he decline, unless there are conditions to the contrary, of which he is advised, he must deliver the warehouse receipts attached. If he retains them, he fails to make the delivery of the property the seller is bound to make. He retains the property without any instructions from the seller. Without delivery of the property, the drawee's acceptance would be without consideration, and his draft would be placed in commerce without his having received anything.

The acceptance of the draft makes the drawee the principal debtor. As this draft was made payable one day after sight, with the three days of grace, it was demandable, as to its payment, in four days. It was not a cash sale; the records do not disclose that the contract implied a sale for cash.

Plaintiffs' counsel argues as if it was an unavoidable inference, that should have controlled the action of the defendant. The general purpose of the law of negotiable paper and the good of commerce require exactness and certainty. The contract is well defined. It must be executed promptly and accurately. A sale on credit will not give rise to the presumption of any intended cash sale.

The restricted indorsement is relied upon by plaintiffs. The indorsement "for collection" does not pass the title or the right to the proceeds of the paper, but it makes the indorsee or collecting agent the trustee of the holder, and as such he cannot be rendered liable if he complies with an agreement made manifest by the contract. From Tiedman on Commercial Paper (page 494) we copy: "But where the bill of exchange is payable in the future, in absence of special agreement, the bill of lading is to be delivered to the vendee upon his acceptance of the bill of exchange according to its tenor, and the holder cannot insist upon holding it until the bill of exchange is paid. The drawee of the bill of exchange may refuse to accept, unless the bill of lading is surrendered to him."

It was held in National Bank v. Merchants' Bank, 91 U. S. 92, 23 L. Ed. 208,—an analogous case,—that, in the absence of instructions, the plaintiff in error was justifiable in having surrendered the bill of lading annexed to the bill of acceptance. It is difficult to conceive of any other meaning of the bill. We abbreviate from that opinion: If the drawee had given a promissory note for the goods, payable at the expiration of the stipulated credit, it is clear that the vendor could not retain possession of the property, after receiving the note for the price. The consideration of the sale is the note. The acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he is denied possession until payment, the transaction ceases to be what it was intended, and is converted into a cash sale. The purchaser of property on credit has a right to immediate possession, unless there be a special agreement that it shall be retained by the vendor. Such an agreement is not to be presumed. The collecting agent has no right to assume that the vendee's term of credit expires before he has the goods, and require him to accept the vendor's draft, and only upon his engagement to deliver at a future time.

With reference to the authority of the agent, who was intrusted (as was the agent in the case at bar) with a draft "for collection," the court holds that the instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft; that the instructions were to collect the money; and, if the drawee is not bound to accept without surrender, it is the duty of the agent to make the surrender. "The drafts were all time drafts." One was drawn at sight; but in Massachusetts, says the court, such drafts are entitled to grace, and in consequence the court classes it as a "time draft."

In Lanfear v. Blossman, 1 La. Ann. 148, 45 Am. Dec. 76, it was decided that the holder of a bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, and he, as holder, retain the bill of lading attached. This decision is favorably commented upon by Justice Strong, the organ of the court, in the case to which we have just referred.

It is pleaded that plaintiffs' claim is sustained by the local custom of merchants, and testimony was heard in support of the plea. The principle upon which such evidence is to be considered is that the parties meant, when they sent the draft, to let the collecting bank follow the local custom and usage, and that, therefore, instructions were unnecessary. It is not proven that plaintiffs knew of any such local usage and custom, nor is it at all manifest that there is any local custom as contended by plaintiffs.

Analysis of the testimony leads to the conclusion that it is not customary to retain warehouse receipts and bills of lading attached to time drafts, after acceptance. The individual instances proven do not have the force of custom. They are not the result of acts repeated, "which have acquired the force of a tacit and common consent." Civil Code, art. 3. It is not the settled custom. If it were, it would be inconsistent with jurisprudence established by a number of trustworthy decisions which exclude such a custom.

The judgment appealed from is affirmed, at plaintiffs' costs.[45]

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[45] See McArthur Co. v. Old Second Nat. Bank, 122 Mich. 223, 81 N. W. 92 (1899).

# SECTION 9.—EFFECT OF SALE BY BAILEE OR FACTOR

## WILKINSON v. KING.

(Nisi Prius, 1809. 2 Camp. 335.)

Trover for a quantity of lead.

The plaintiff had sent the lead in question to the wharf of one Ellil in the Borough of Southwark, there to remain till it should be sold. Ellil was accustomed to sell lead from this wharf; but had no authority whatever to sell the lead in question, and never had sold any for the plaintiff before. However, he sold this lead to the defendants, who bought it bona fide as his property, and paid him for it by a bill of exchange.

Garrow contended that this sale had taken place in market overt, and had transferred the property in the lead to the defendants. The spot where the transfer was made was in the Borough of Southwark, which must be considered a part of the metropolis; and it was laid down in the books on this subject, that in London, every shop in which goods are publicly exposed to sale, is market overt for such things as the owner professes to trade in, and that though in the country, market overt is only on the special days when the market is held by charter or prescription, yet in London every day, except Sunday, is market day. Therefore, this lead having been sold to the defendants by Ellil at his wharf, where he dealt in lead, became their property, and the plaintiff must seek his remedy against Ellil, whom he had enabled to commit the fraud, out of which the action arose. But

Lord Ellenborough held, that the sale by Ellil did not change the property in the lead, and observed, that the doctrine contended for would give wharfingers the dominion over all the goods intrusted to them; but that a wharf could not be considered, even in London, as a market overt for the articles brought there. Ellil had no colour of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion.

Verdict for the plaintiff.

## PICKERING v. BUSK et al.

(Court of King's Bench, 1812. 15 East, 38.)

Trover for hemp. At the trial, before Lord Ellenborough, C. J., at the sittings after Trinity term in London, it appeared that Swallow, a broker in London, engaged in the hemp trade, had purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at Symonds's wharf in Southwark. The hemp was delivered to Swallow, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards, Swallow purchased for the plaintiff another parcel of hemp, lying at Brown's quay, Wapping, which latter parcel was transferred into the names of Pickering (the plaintiff) or Swallow. Both these parcels of hemp were duly paid for by the plaintiff. Swallow, however, whilst the hemp remained thus in his name, having contracted with Hayward & Co. as the broker of Blackburn & Co. for the sale of hemp, and having none of his own to deliver, transferred into the names of Hayward & Co. the above parcels in satisfaction of that contract, for which they paid him the value. Hayward & Co. shortly after became bankrupts; and the plaintiff, discovering these circumstances, demanded the hemp of the defendants, their assignees, and upon their refusal to deliver it, the present action was brought.

His lordship was of opinion upon this evidence, that the transfer of the hemp, by direction of the plaintiff, into Swallow's name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

Lord ELLENBOROUGH, C. J. It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily, and in all cases, limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe.

The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of Paterson v. Tash, that doctrine has never been overturned. I remember Mr. Wallace arguing in Campbell v. Wright, 4 Burr. 2046, that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the indicia of property: the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

Le Blanc, J. The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it; and, which is equally clear, that the possession of a factor or broker does not authorize him to pledge. But this is a case of sale. The question, then, is, whether Swallow had an authority to sell. To decide this, let us look at the situation of the parties. Swallow was a general seller of hemp: the hemp in question was left in the custody of the wharfingers, part in the name of Swallow, and part in the name of the plaintiff or Swallow, which is the same thing. Now for what purpose could the plaintiff leave it in the name of Swallow, but that Swallow might dispose of it in his ordinary business as broker: if so, the broker having sold the hemp, the principal is bound. This is distinguishable from all the cases, where goods are left in custody of persons, whose proper business it is not to sell.[46]

## LEVI et al. v. BOOTH.

(Court of Appeals of Maryland, 1882. 58 Md. 305, 42 Am. Rep. 332.)

Alvey, J.[47] In this case it appears that the plaintiff was the owner of a valuable diamond ring, and he placed it in the hands and possession of a party by the name of De Wolff, a dealer and trader in jewelry, for the purpose of obtaining a match for it, or, failing in that, to get an offer for it; and there is nothing in the proof to show that it was given into the possession of De Wolff for any other purpose, or that he was in any manner authorized to sell it.

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[46] Concurring opinions were delivered by Grose and Bayley, JJ.

[47] The statement of facts and part of the opinion are omitted.

The defendants were pawnbrokers, and dealt in articles of jewelry. De Wolff dealt with them, and made purchases on credit, and settled from time to time; and among other articles of jewelry, he purchased diamond rings, earrings, studs, watches, etc., and became considerably indebted to the defendants. He appears to have been a sort of street peddler of articles of jewelry,—going from place to place and disposing of his articles upon the best terms he could make. He had no shop or established place of business.

On the part of the defendants the evidence tended to show, that De Wolff sold the ring to Henry Levi, one of the defendants, for a certain price,—part paid in cash, and the other part in goods. But, on the part of the plaintiff, proof was given, that before such alleged sale, Henry Levi had been informed that the ring belonged to the plaintiff, and that De Wolff had no power or authority to sell it. De Wolff, as witness, proved that he left the ring with Henry Levi to obtain an offer for it, but with no authority to sell it; while, on the other hand, Henry Levi testified that he purchased the ring of De Wolff, supposing him to have been the real owner of it. It was also proved, by the admission and statement of Henry Levi, when demand was made of the defendants by the plaintiff for the ring, that the ring had been sold to some person whose name he did not know or could not furnish.

The plaintiff brought his action in trover for the conversion of the ring, and recovered a verdict and judgment for the supposed value thereof.

At the trial, upon the evidence offered, the plaintiff submitted two prayers for instruction to the jury, and they were both granted; and the defendants submitted six prayers, all of which were refused; and to the rulings of the Court in respect to these several prayers, the defendants excepted.

Upon these prayers thus submitted, three principal questions are presented:

1st. Supposing it to be true, as contended by the defendants, that De Wolff did sell the ring to Henry Levi, one of the defendants, as if he were the owner thereof, when in fact he was not the owner, and had no express authority to sell it, whether, under the facts disclosed in evidence, such sale was good and effective at the common law, as between the defendants and the real owner? If not,

2d. Whether such sale was good and effective, in view of the facts disclosed, as between the real owner of the ring and the defendants, under the provisions of what is known as the Factors' Act, Code, art. 3, § 4? And,

3d. If neither of the defendants acquired title to the ring, whether, under the facts of the case, there was such conversion thereof by the defendants, or one of them, as would entitle the plaintiff to recover?

1. It is certainly a well established principle of the common law,

founded, as it would seem, upon a maxim of the civil law, "nemo plus juris in alium transferre potest quam ipse habet," that a sale by a person who has no right or power to sell, is not effective as against the rightful owner. Sales made in market overt were an exception to this general rule; but the old Saxon institution of market overt has never been recognized in this State, nor, as far as we are informed, in any of the United States. Browning v. Magill, 2 Har. & J. 308; Mowrey v. Walsh, 8 Cow. (N. Y.) 238; Dame v. Baldwin, 8 Mass. 518; Ventress v. Smith, 10 Pet. 175, 9 L. Ed. 382. At the common law, therefore, a person in possession of goods cannot confer upon another, either by sale or pledge, any other or better title to the goods than he himself has. To this general rule there is an apparent exception in favor of bona fide purchasers or pledgees, where the party in possession making the sale or pledge has a title defeasible on account of fraud, or by reason of a condition in the contract of sale under which he holds. Hall v. Hinks, 21 Md. 406; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993.

Therefore, to make either a sale or pledge valid as against the real owner, where the sale or pledge is made by another person, it is incumbent upon the person claiming under such sale or pledge, to show that the party making it had authority from the owner. Cole v. North-Western Bank, L. R. 10 C. P. in Ex. Ch. 354, 363; Johnson v. Credit Lyonnais, 2 C. P. Div. 224, affirmed on appeal 3 C. P. Div. 32. If, however, the real owner of the goods has so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he will, even by the common law, be precluded from denying as against those who may have acted bona fide on the faith of that apparent authority, that he had given such authority, and the result, as to them, is the same as if he had really given it; but it is, of course, otherwise in respect to those who may have acted with notice of the want or limitation of authority in point of fact.

This principle of estoppel, as applied to sales or pledges of goods or merchandise, is aptly and completely illustrated in the familiar and often cited case of Pickering v. Busk, 15 East, 38. The case was decided before the passage of any of the English Factor Acts, and the facts were, that the true owner had bought parcels of hemp through Swallow, who was a broker and an agent for sale. At the instance and request of the plaintiff, the real owner, the hemp was transferred on the books of the wharfinger from the name of the seller to that of Swallow, who, without express authority from the owner, afterwards sold it. In an action of trover by the real owner, to recover for the conversion of the hemp thus, sold, it was held, that the transfer on the books of the wharfinger by the direction of the plaintiff to the name of Swallow, authorized the latter to deal with the hemp as owner with respect to third persons, and that the plaintiff, who had thus enabled Swallow to assume the appearance of ownership to the world, should abide the consequence of his own act. Lord Ellenborough said: "It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority." And in conclusion he said: "The sale was made by a person who had all the indicia of property: the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name."

The same principle, though applied in a case quite different in its circumstances, was adopted by this Court, in the case of Lister & Supplee v. Allen, 31 Md. 543, 100 Am. Dec. 78. And in the recent English cases of Cole v. North-Western Bank, L. R. 10 C. P. Ex. Ch. 354, Johnson v. Credit Lyonnais, 2 C. P. Div. 224, affirmed on appeal 3 C. P. Div. 32, and City Bank v. Barrow, 5 App. Cas. H. L. 664, the same principle, with its proper limitations, was fully expounded, both as it exists at the common law, independently of statute, and as it has been modified by what is known as the Factors' Acts; and those cases fully and clearly maintain the principles we have stated.

In this case there is no evidence that there was any express authority by the plaintiff to De Wolff to sell the ring; though there is evidence that De Wolff was authorized to procure an offer for it. This, of course, reserved to the plaintiff the right to accept or reject the offer, if one was made. With this limitation of authority, there can be no question of the principle propounded in the plaintiff's first prayer; for that goes upon the hypothesis that there was no sale in fact to Levi, but that the ring was simply left with the defendants, and that they afterwards, without other authority, sold it. If it be true that there was no sale to the defendants, or one of them, and that they, simply having the possession, and without authority for so doing, sold or disposed of the ring, it is clear they were wrong-doers, and therefore liable for the conversion. This was the theory and the principle upon which the plaintiff's case appears to have been presented in the Court below.

2. But, on the part of the defendants, the case was presented in a different aspect. According to the theory of the fourth, fifth, and sixth prayers of the defendants, there was a sale by De Wolff to the defendants, or one of them; and the Court was asked, by the fourth and fifth prayers, to instruct the jury, that if they found that De Wolff was a dealer in jewelry, and, with knowledge of that fact, the plaintiff intrusted him, or intrusted him as agent, with the possession

of the diamond ring, and thereby put it in his power to act as apparent owner thereof, and that the defendants acted upon the faith of such apparent ownership, and purchased the ring for value and without notice of the ownership of the plaintiff, then the plaintiff could not recover.

The sixth prayer proposed to submit to the jury to find, whether the ring had not been delivered or intrusted to De Wolff by the plaintiff, with authority to sell or dispose of it, under certain limitations as to price. But, as we have already said, there was no evidence of such authority being delegated to De Wolff, and the Court, therefore, would not have been justified in submitting that question to the jury. That prayer, therefore, was properly refused.

But, with respect to the propositions involved in the fourth and fifth prayers, other and different considerations are presented.

Independently of the provisions of the statute in regard to the dealing with agents and factors, it is very clear, upon the principles that we have already stated, that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner there must be some other indicia of property than mere possession. There must, as in the case of Pickering v. Busk, supra, and more fully expounded and illustrated in Johnson v. Credit Lyonnais, supra, be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances. If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweller's establishment to be repaired, or cloth to a clothing establishment to be made into garments. If De Wolff, instead of being a mere peddler of jewelry, had occupied a shop where he carried on the business of jeweller, and the ring had been left with him, either to be mended, or reset, or to be exposed to inspection in order to procure an offer for it, without any authority to sell it, we suppose it to be clear, that the owner could not have been divested of his property by an unauthorized sale by the jeweller, under such circumstances. And if he could not be divested of his property by sale under such circumstances, we do not perceive how the present case could be distinguished, in principle, from that just stated.

It is true, the general rule of the common law, that a person in the sale or pledge of goods cannot confer a greater or better title than he himself possesses, has, to some extent and under special circumstances, been modified by statute. The principal provisions of our own statute, (Code art. 3,) in relation to Agents and Factors, are substantially, and in several particulars literally, the same as the English Statutes of 4 Geo. IV, ch. 83, 6 Geo. IV, ch. 94, and 5 and 6 Vict. ch. 39, upon the same subject. By these statutes a more extended authority than existed by the rules of the common law has, for the facility and convenience of commerce, been conferred on agents and factors, or rather, greater protection has been secured to vendees and pledgees dealing with such agents. The general effect of these statutes is to render valid sales and pledges made by factors and agents, in cases where the agency may not be known to the buyer, or notwithstanding notice of the fact of their being merely agents or factors, provided the party dealing with them shall not have notice that they are acting without authority or mala fide.

Section 4 of article 3 of the Code, provides that any person may contract with any agent or factor intrusted with any goods, etc. for the purchase thereof, and may receive from and pay for the same to such agent; and such contract and payment shall be good against the owner, notwithstanding such person shall have notice that the person making the contract is an agent or factor; provided, however, that such contract and payment be made in the usual course of business, and that such person shall not, when the contract is entered into or payment made, have notice that the agent or factor is not authorized to sell the goods, or to receive the money for the same.

This section of the statute does not appear to have received any express construction by this Court; but it is quite apparent, that, in order to arrive at a true construction of it, two things must be considered; first, whether the agent intrusted with the goods and making the sale thereof was of the class or species contemplated by the Act; and, secondly, whether the contract of sale was made in the usual and ordinary course of business by such agent.

The similar and corresponding section in the English Factors' Act of 6 Geo. IV, ch. 94, § 4, and as extended by 5 and 6 Vict. ch. 39, has been the subject of extensive discussion in the Courts of that country; and the Courts there hold, that the Factors' Acts have no application to any other than mercantile transactions; that the generality of the terms, "any agent or factor intrusted with goods, merchandise," etc. must be taken in a restricted sense; and that while every person intrusted by the owner with the care, storage, or carriage of goods, is, in one sense, an "agent intrusted with goods," yet he is not an agent within the meaning of the statutes. Monk v. Whittenburg, 2 B. & Ad. 484; Wood v. Rowecliffe, 6 Hare, 191.

In the case of Heyman v. Flewker, 13 C. B. (N. S.) 519, Mr. Justice Willes, in delivering judgment, says that what the cases decide "may be stated thus—that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name." And this statement, as the result of the authorities, has been fully and without qualification adopted, as being in all respects correct, by the Court of review in Exch. Ch., in the case of Cole v. North-Western Bank, L. R. 10 C. P. 354, and in Johnson v. Credit Lyonnais, 2 C. P. Div. 224, affirmed on appeal 3 C. P. Div. 32, and in the case of City Bank v. Barrow, 5 App. Cas. Ho. Lords, 664.

Now, adopting this construction which has been placed upon the provision of the English statute similar to our own, as the proper construction of the terms of our statute, of which we entertain no doubt, the question is, whether De Wolff was an agent within the sense and meaning of the statute? That he was simply a dealer in jewelry would seem clearly to be without any reliable effect upon the question of authority; and there was nothing to show, and the prayers did not offer to submit to the jury to find, that he was either factor, broker, auctioneer, commission agent, or other agent whose business it was qua agent to sell; or that he did sell the diamond ring in question in the usual and ordinary course of business. And without such finding upon the construction of the statute just stated, the sale was not within the protection of the statute; and therefore the prayers were properly refused. * * *

Judgment affirmed.[48]

## NIXON v. BROWN.

(Superior Court of Judicature of New Hampshire, 1876. 57 N. H. 34.)

Trover, for a horse. The action was sent to a referee, who reported that he found the defendant not guilty, &c., and that he recover against the plaintiff his costs. He also reported the following facts, on the basis of which he held that the plaintiff could not recover:

"In May, 1874, one Charles Mason, who resided in Whitefield, N. H., purchased the horse in question of one Hubbard, who resided in Dalton, N. H., for the plaintiff, who furnished the money ($95.00) to Mason to pay for the same. Mason did not disclose to Hubbard that he was purchasing for the plaintiff, but, on the contrary, gave Hubbard to understand that he was acting for himself, and took a bill of sale of the horse from Hubbard to himself. Afterwards Mason informed the plaintiff that he had made the purchase, and showed him the bill of sale, and told him he could give him a bill of sale, and that would make it all right, but did not do so; and it was then arranged that Mason should bring the horse to the plaintiff on the following Monday, this being on Saturday; and it was further arranged that Mason, after he had brought the horse to the plaintiff, should take him and keep him, and drive him to better break him. Mason never brought the horse to the plaintiff, but on Tuesday—having previous to said Saturday showed the horse to the defendant, who was then stopping at Whitefield, and represented to the defendant that he, Mason, owned him—he showed the defendant the bill of sale from Hubbard, and finally sold the horse to the defendant, and received in payment $75.00, and then left for parts unknown. There was a sufficient demand before suit."

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[48] See, also, Smith v. Clews, 114 N. Y. 190, 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. Rep. 627 (1889).

At this September term, 1875, both parties moved for judgment on the report, and the court ordered judgment for the plaintiff, to which the defendant excepted, and tendered this bill of exceptions, which was allowed by Foster, C. J. C. C.

LADD, J. I am of opinion that the defendant's exceptions in this case must be sustained, and that judgment should be entered in his favor upon the report of the referee. The general rule, that the possession of goods by a bailee, or servant, gives him no power to make any disposition of them, except by virtue of actual authority received from the owner (Perley, J., in Folsom v. Batchelder, 22 N. H. 51), is so well settled as to be quite elementary. But there are several exceptions to this rule, quite as well settled, and quite as well understood as the rule itself.

One relates to money, bank bills, checks, and notes payable to the bearer, or transferable by delivery. The cases establishing this exception, commencing, perhaps, with Miller v. Race, 1 Burr. 452, are very numerous, and quite uniform. Another exception, in England, relates to sales in market overt. But as we have no markets overt in this state (Bryant v. Whitcher, 52 N. H. 158), that exception has no existence here.

Another is where the possession of the bailee, from the nature of his employment, implies an authority to sell, as, when goods are left with an auctioneer or factor, a sale by such bailee, though he had no actual authority, will bind the owner. Perley, J., in Folsom v. Batchelder, supra, 22 N. H. 51, and cases cited. The reason given for this last exception is, that the owner has allowed the bailee in possession to hold out the appearance of an authority to sell, which would deceive and defraud the fair purchaser if the law allowed the validity of the sale to be questioned. This statement of the reason, thus clearly and succintly given by the late Chief Justice Perley, suggests the ground of my decision in this case. The facts, specially stated by the referee, show most clearly to my mind that the plaintiff allowed Mason, while he retained possession of the horse, to hold out the appearance of ownership in himself, and so of an authority to sell, which would deceive and defraud a fair purchaser if the law permitted the validity of the sale to be questioned.

The plaintiff's counsel undertakes to avoid the application of this just and wholesome rule by saying that the taking of the bill of sale by Mason in his own name was not the plaintiff's act; and this is true. Mason bought the horse for the plaintiff, and paid for it with the plaintiff's money. Why he concealed the fact of his agency from Hubbard and why he took a bill of sale in his own name instead of that of his principal, does not appear; but inasmuch as this was all contrary to the truth of the transaction, it is fair to presume that it was part of the scheme of fraud which he then had it in his mind to perpetrate. So far there was certainly no act of the plaintiff, and nothing to prevent the application of the general rule, which Chancellor Kent says is a maxim alike of the civil and common law, that "nemo plus juris ad alium transferre potest quam ipse habet." 2 Kent's Com. 324.

But the report states, that after the purchase "Mason informed the plaintiff that he had made the purchase, and showed him the bill of sale, and told him he could give him a bill of sale, and that would make it all right, but did not do so; and it was then arranged that Mason should bring the horse to the plaintiff on the following Monday, this being on Saturday; and it was further arranged that Mason, after he had brought the horse to the plaintiff, should take him and keep him, and drive him to better break him," &c. What was the meaning of this talk about Mason giving the plaintiff a bill of sale of his own horse? Why did he not hand over the bill of sale he took from Hubbard? True, it is not expressly stated by the referee that the plaintiff assented to this proposal of Mason, which if it had been carried out would have left Mason with the highest evidence of ownership still in his possession. But the inference is irresistible that he did assent to it, at least so far as to permit Mason to go away with Hubbard's bill of sale, having the horse still in his possession.

Why did not the plaintiff take from his agent either the bill of sale or the horse? Counsel say he could not do it, perhaps, without a breach of the peace. Did he make the effort? That does not appear. Suppose he had demanded the bill of sale, and his agent had refused to give it up to him, would he have suspected then that there was anything unusual or wrong in Mason's conduct? If Mason had refused, upon demand, to give up either the horse or this evidence of title in himself, what was there to hinder the plaintiff from taking the animal upon a writ of replevin in the detinet, under our present statute? A refusal by Mason to hand over both the horse and the bill of sale upon demand, would amount to a conversion in law, and would in fact be evidence of the most conclusive character that he intended to appropriate the animal to his own use, regardless of the plaintiff's rights.

Even if the plaintiff's suspicions were not aroused by the extraordinary circumstance that Mason had taken the bill of sale in his own name, a demand of this sort would either have disarmed his agent of the power to deceive and defraud innocent purchasers, or would have developed a purpose to appropriate the property, which would call for immediate action by the plaintiff to secure himself, as against the rapacity of a thief. Why did the plaintiff suffer Mason to go away with the bill of sale and the horse both in his hands? No answer to this question appears in the case, and no answer at all sufficient to my mind has been suggested in the argument. That act of the plaintiff was, as it seems to me, little if at all less significant than if he had himself executed a bill of sale of the horse, and delivered it to Mason along with the animal. At any rate, I see no just reason why, so far as regards the rights of an innocent purchaser, it should not be followed by the same legal consequences.

At the argument Mr. Carpenter put this supposed case: A., having sold his horse to B., delivers the animal, together with a bill of sale running to B., to his servant or agent, to be carried to the vendee. But the servant on the way, finding a customer for the horse, produces the bill of sale, represents himself to be the person there named as purchaser, and sells the horse to an innocent third person. Of course there could be no question of the right of the owner to recover his property, under that state of facts, against such innocent purchaser. The cases covering this point are numerous, of which Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541, is a good example. In that case it was held that the purchaser of part of a cargo of a vessel was not protected against the claims of the real owner, although the purchase was made under a bill of lading, regular and fair, on its face—it appearing on the trial of the cause that the master of the vessel, in which the goods were originally shipped, had fraudulently, at an intermediate port, transshipped the goods into another vessel, and procured a bill of lading in his own name, which he transferred to his agents, the vendors.

If the plaintiff had not been informed of the fact that Mason had taken a bill of sale of the horse in his own name, and with that knowledge permitted him to go forth clothed with all the indicia of ownership, and so completely armed for the commission of a fraud, the case supposed in argument, and that class of cases of which Saltus v. Everett has been referred to as the type, might have application. As it is, I think they do not apply at all. I regard this act, or omission, if it should be called an omission, of the plaintiff as decisive of the case, and I am therefore of opinion that there should be judgment on the report for the defendant.

Exceptions sustained.[49]

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[49] See, also, O'Connor v. Clark, 170 Pa. 318, 32 Atl. 1029, 29 L. R. A. 607 (1895).

## WARNER v. MARTIN.

(Supreme Court of the United States, 1850. 11 How. 209, 13 L. Ed. 667.)

Wayne, J.[50] We state such circumstances in this case as may be necessary for the application of our opinion to other cases of a like kind.

Martin & Franklin were manufacturers of tobacco in Richmond, Virginia. They were in the habit of shipping the article to Charles Esenwein in New York, as their agent and factor. In April, 1841, they made the first shipment upon a new account to Esenwein, and at intervals during the summer made other consignments to him. It was their practice to draw upon Esenwein, payable in four months, for an estimated portion of the proceeds of sale; among other drafts were the following:

1841, May 27, at four months, due Sept. 30, for $800.
" June 12, " " " Oct. 15, " 700.
" July 3, " " " Nov. 6, " 300.
" July 29, " " " Dec. 2, " 850.

These drafts were not paid by Esenwein. The consignments during the period when the drafts were drawn were 162 half, and 160 whole boxes of tobacco. Esenwein's entry of the consignment is: "Statement of tobacco received by Charles Esenwein & Co. from Messrs. Martin & Franklin of Richmond, Virginia, to sell for their account."

The business relation between them in this transaction was that of principal and factor, unaffected by any particular instructions from the principals, or by any right or power acquired by the factor, beyond his general commission to sell the tobacco, according to the usages of trade in the place to which it had been sent for sale.

In August, 1841, Esenwein became embarrassed and sailed for Europe. He left his business under the management of his clerk, Engelbert Caprano. On the 3d of September, Esenwein failed. Among his creditors was John A. Warner of Philadelphia. A short time before the failure, Mr. Warner, between whom and Esenwein there had been much previous dealing, went to New York. He then obtained from Caprano, the clerk, from the store of Esenwein, a quantity of tobacco, cigars, and other merchandise. The proof in the case is, that the tobacco was a part of the consignments which had been made within the dates before mentioned by Martin & Franklin to Esenwein.

Warner says, in his answer to the bill of the complainant, that the same was purchased by him for a full consideration and price, in like manner as he had frequently purchased from Esenwein; and that he did not know that the tobacco belonged to Martin & Franklin. But he admits, "the insolvency of Esenwein was believed." In his amended answer he says, he purchased the tobacco bona fide, in manner as had been before stated by him. That it was paid for after the purchase, by his paying and adjusting $30,000 of his own notes, which he had loaned to Esenwein, by his paying and redeeming them Subsequently, in three days after Esenwein's failure, Heald, Woodward & Co. of Philadelphia, bought from Warner 258 boxes of tobacco, known as Martin's tobacco. The proof in the case is, that it was a part of that which Warner had obtained from Esenwein's clerk, which had been consigned to Esenwein by Martin & Franklin, as already stated. They aver, and there is no reason or cause to doubt it, that they purchased from Warner fairly, and for full value; that they had no knowledge whatever at the time, that the tobacco or any part of it belonged to the complainants; nor had they any reason to believe or know it. Their contract, however, with Warner, was rescinded in part. They received from him only 124 boxes, instead of the 258 which had been sold to them. * * *

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[50] Part of the opinion is omitted.

The exact questions raised by the record are, whether or not the transfer of the tobacco to Warner divested the plaintiff's ownership of it; and whether or not Warner's sale of a part of it to Heald, Woodward & Co., for a full consideration, without any knowledge upon their part of the plaintiff's interest when they bought from Warner, gave to them a property in it. * * *

On either of the grounds already mentioned, the plaintiff would be entitled to recover from the defendants in this case. But there is a third, which shall be stated in connection with other points respecting principals and factors, which it will not be out of place to notice. A factor or agent who has power to sell the produce of his principal, has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. Paterson v. Tash, Str. 1178; Maanss v. Henderson, 1 East, 337; Newsom v. Thornton, 6 East, 17; 2 Smith, 207; McCombie v. Davies, 6 East, 538; 7 East, 5; Daubigny v. Duval, 5 T. R. 604; 1 Maule & Selw. 140, 147; 2 Stark. 539; Guichard v. Morgan, 4 Moore, 36; 2 Brod. & Bing. 639; 2 Ves. Jr. 213.

When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged, Daubigny v. Duval, 5 T. R. 604; or without any demand of such goods, 6 East, 538; 12 Mod. 514; and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor, Martini v. Coles, 1 Maule & Selw. 140, unless, indeed, where the principal has held forth the agent as the principal, 6 Maule

& Selw. 147. But a factor, who has a lien on the goods of his principal, may deliver them over to a third person, as a security to the extent of his lien, and may appoint such person to keep possession of the goods for him. In that case, the principal must tender the amount of the lien due to the factor, before he can be entitled to recover back the goods so pledged. Hartop v. Hoare, Str. 1187; Daubigny v. Duval, 5 T. R. 604; 6 East, 538; 7 East, 5; 3 Chitty's Com. Law, 193.

So a sale upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and the buyer, and the thing sold may be recovered in an action of trover. Paley, Principal and Agent, 109; 12 Mod. 514. Under any of these irregular transfers, courts of equity (as is now being done in this case) will compel the holder to give an account of the property he holds.

But it was said, though a factor may not pledge the merchandise of his principal as a security for his debt, he may sell to his creditor in payment of an antecedent debt. No case can be found affirming such a doctrine. It is a misconception, arising from the misapplication of correct principles to a case not belonging to any one of them. The power of the factor to make such a sale, and the right of the creditor to retain the property, has been erroneously put upon its being the usual course of business between factors to make a set-off of balances as they may exist in favor of one or the other of them against the price of subsequent purchases in their dealings. The difference between such a practice and a sale for an antecedent debt must be obvious to every one when it is stated. In the one, the mutual dealing between mercantile persons who buy and sell on their own account, and who also sell upon commission for others, is according to the well-known usage of trade. Its convenience requires that such a practice shall be permitted. But it must be remembered it is an allowance for the convenience of trade, and for a readier settlement of accounts between factors for their purchases from each other in that character. It does not, however, in any instance, bind a principal in the transfer of merchandise, if there has been a departure from the usages of trade, or a violation of any principle regulating the obligations and rights of principal and factor.

Again, it has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor, in payment of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another; and if in the last he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word or in any sense in which it is used in reference to the commission which a factor has to sell. Williamson v. Berry, 8 How. 495, 12 L. Ed. 1170. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such a transfer, but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another in release of his obligation, their relation has only been changed by his violation of an agency which society in its business relations cannot do without, which every man has a right to use, and which every person undertaking it promises to discharge with unbroken fidelity.

When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash, or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent debt, is not doing one thing or the other. Both creditor and debtor know it to be neither. That their dealing for such a purpose will be a transaction out of the usage of the business of a factor. It does not matter that the creditor may not know, when he takes the property, that the factor's principal owns it; that he believed it to be the factor's in good faith. His dealing with his debtor is an attempt between them to have the latter's debt paid by the accord and satisfaction of the common law. That is, when, instead of a sale for a price, a thing is given by the debtor to the creditor in payment, in which we all know that, if the thing given is the property of another, there will be no satisfaction. It is the dation en payement of the civil law as it prevails in Louisiana, which is, when a debtor gives, and the creditor receives, instead of money, a movable or immovable thing in satisfaction of the debt.

Courts of law and courts of equity, in a proper case before either, will look at such a transaction as one in which both principal and creditor have been deceived by the factor, so far as the deceit is concerned; but it will also be remembered in favor of the principal, that the creditor has acquired the principal's property from his factor, with the creditor's knowledge, out of the usual course of trade, and will reinstate him in his former relation to his debtor, rather than that the creditor should be permitted to keep the property of another who is altogether without fault, in payment of his debt. As to a factor's power to bind his principal by a disposition of his goods, the common law rule is, "that, to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been, either in market overt and without knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions," or that he had not such notice as the law deems equivalent to raise that presumption. "The reason of this is clear, for unless the transaction took place bonâ fide in a market overt, (in which case a peculiar rule of law in England steps in for its protection,) an agent selling without express authority must, that his acts may be supported, have sold under an implied one. But an implied one thereby always empowers the person authorized to act in the usual course of his employment; consequently, if he sells in an unusual mode, he could have no implied authority to support his act, and as he had no express one, his sale of course falls to the ground." Smith's Mercantile Law (Amer. Ed.) 118.

The defendants are not within the compendious summary just stated. There has been a transfer of property, which was consigned to a factor for sale, by his clerk, to a creditor of his employer, who knew his debtor to be in failing circumstances, just as well as the clerk himself did; and of property, too, which the clerk knew to be the property of the plaintiff, and which the creditor bargained for knowingly out of the usual course of trade. Nor should we omit to say, that Esenwein's opinion and disapproval of what had been done by his clerk with his principal's tobacco are significantly disclosed by the fact, that, upon his return from Europe, he redeemed so much of it as had been assigned to Mr. Conolly by his clerk in payment of a debt, and sold and remitted the proceeds to his principals.

By the common law, the transfer of the plaintiff's tobacco to Warner cannot be maintained. He is responsible to them for the value of so much of it as was not transferred by him to Heald, Woodward & Co. Heald, Woodward & Co. are responsible for so much of it as Warner transferred to them, because Warner, having no property in it, could not convey any to them. But Warner is answerable to them for that amount, and he is replaced for the whole as a creditor of Esenwein, just as he was before the transaction occurred.

The application of these principles of the common law to these parties, if it needed confirmation, would receive it from the statute of New York of April, 1830, for the amendment of the law relative to principals and factors or agents. The transfer to Warner was a New York transaction. The third section of that act very distinctly provides for those cases when the ownership, by the factor, of goods which he contracts to sell, shall be said to exist, to give protection to purchasers against any claim of the factor's principal. It is when he contracts for any money advanced, or for any negotiable instrument or other obligation in writing given for merchandise, upon the faith that the factor is the owner of it. The concluding words of the section are, "given by such other person upon the faith thereof."

Three misconstructions of that act have been prevalent, but they have been corrected by the courts of New York. We concur with them fully. One was, that the statute altered the common law, so as to give validity to a sale made by the factor for an antecedent debt due by him to the person with whom he contracts; another, that the statute gave to a purchaser protection, whether he knew or not that the goods which the factor contracted to sell him were not the factor's, and belonged to his principal; and the other, that the concluding words, "upon the faith thereof," related to the advance made upon the goods, and not to the property which the factor had in them. Similar misconceptions were prevalent, and perhaps still prevail, concerning the corresponding section in the English factor's act, Geo. IV, c. 94, 1825. The alterations of the common law, in this particular, by the English and the New York statutes, were suggested by practical and experienced merchants in both countries, to meet the exigencies of internal trade and its extension between nations. They are believed by their operation to be improvements in the law merchant. It may be owing to a misapprehension of those acts, that the defendants denied to the plaintiffs their rights. Fortunately the law secures them, and the case settled now as it is may prevent other controversies like it.

We shall direct the decree of the circuit court to be affirmed; and also order a decree to be entered against the defendants, that each of them shall pay to the plaintiffs the value of the tobacco which the defendants respectively retained, with interest upon the same as from the dates of the transfers of it to them.

## ROMEO v. MARTUCCI.

(Supreme Court of Errors of Connecticut. 1900. 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601, 77 Am. St. Rep. 327.)

HAMERSLEY, J.[51] The finding is in some respects strongly suggestive of bad faith on the part of the defendant. But as the court, notwithstanding the suggestive appearances, finds that the defendant paid a reasonable price, after inquiry, and without notice of defect in title, he must be treated as an innocent purchaser for value. We have then these facts: Ricciardelli & Bro., retail grocers in New Haven, agreed to sell on commission for the plaintiffs, wholesale grocers in New York, a quantity of groceries valued at $559. The goods were received on consignment at New Haven on January 20th, and the same day the Ricciardellis, for the lump price of $965, sold their grocery store, stock (including the plaintiffs' property), fixtures, household furniture, and good will of business, to the defendant, a purveyor of contract laborers in New York, and then disappeared without accounting to the plaintiffs. This action was brought the next day.

There is no doubt as to the relation between the plaintiffs and the

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[51] The statement of facts is omitted.

Ricciardellis. It is that of principal and factor,—a relation long regarded as beneficial in the transaction of business, and one whose legal effect has been defined by numerous decisions. Lawrence v. Bank, 6 Conn. 521, 527. The property consigned is bailed, and remains in the ownership of the consignor until disposed of by the consignee in pursuance of the agency established by the fact of the consignment. If the consignee, in violation of the consignment, and out of the usual course of business, transfer to another, the consignor is entitled to retake his property, notwithstanding it may have been so transferred to an innocent purchaser for value. This principle is too thoroughly established to permit of argument. The transfer by the Ricciardellis was in plain violation of the consignment.

No serious claim to the contrary is made or can be maintained. The only real question is whether the plaintiffs have done anything which estops them from setting up their rights as consignors. If by their voluntary action they clothed the Ricciardellis with an appearance of ownership beyond that involved in the ordinary contract of consignment, and the defendant was thereby deceived to his damage, they are estopped from denying the authority thus evidenced by their acts. This principle is rooted in justice, and has been applied to a great variety of conditions. Such action by the owner of property may furnish evidence of fraud, and the question of estoppel is sometimes confused with that of fraudulent transfer. Possession may be evidence of fraud when it conceals the usual evidence of a change of title. This applies especially to the mortgage or pledge of personal property, where the mortgagor is presumed to remain owner of the property unless there is a change of possession. But it is different where property known to belong to one man comes into the possession of another. In such case it becomes a matter of inquiry whether he has borrowed it or hired it or purchased it, and this ought to be ascertained by him who proposes to trust his property upon the faith of this appearance. Forbes v. Marsh, 15 Conn. 384, 397. Accordingly cases of conditional sale made bona fide have been held good; and, in the modern and somewhat perilous enlargement of such sales, the fact of actual intent and good faith is made the test of the transaction. Lewis v. McCabe, 49 Conn. 141, 155, 44 Am. Rep. 217; Mack v. Story, 57 Conn. 407, 413, 18 Atl. 707.

But here there is no question as to the nature of the transaction. It is the ordinary contract of consignment. There is no question of fraud on the part of the owner. The good faith of the plaintiff's conduct is neither directly nor indirectly impugned. The sole claim is that he has "voluntarily permitted another to hold himself out to the world as being the true owner, and for this purpose intrusted him with the exclusive possession or other indicia of title under circumstances which would naturally tend to mislead." The cases where the real owner has been estopped by having clothed the possessor with indicia of title for such purposes and under such circumstances are many.

"But all these cases proceed upon the ground that the owner has deliberately assumed a false position, and a character inconsistent with that of owner, which, if changed, would result in fraud and damage." They have no application to a case where the acts of the owner are confined to those incident to a legitimate bailment or consignment. "Every borrower or bailee for hire uses the thing bailed, in many respects, as his own, and his conduct, to some extent, furnishes a false index of property; but yet, the legal powers and duties of bailee being entirely consistent with the true position and character of the owner, the rights of the bailor will be protected against the abuse of the bailee's powers, though he were to sell the property bailed to a bona fide purchaser." Baldwin v. Porter, 12 Conn. 473, 482, 483.

A consignee differs from an ordinary bailee mainly in that he is authorized to sell in the ordinary course of business; but, if he sell out of the ordinary course of business, he abuses his powers, and against this abuse the consignor is protected, like any other bailor. When a mortgagee leaves the property mortgaged in the possession of the mortgagor, possession under such circumstances may be treated as an index of title. It is inconsistent with the real transaction, which demands a change of possession, and the mortgagee deliberately puts himself in a false position. But in the case of a consignment the reverse is true. Possession by the consignee is consistent with the transaction, and is evidence of the authority pertaining to that transaction, but furnishes no other index of title as against the consignor. Some act of the consignor inconsistent with the true relation is necessary for that purpose,—as if the bill for goods consigned were made out as one for goods sold, or a bill of lading were given which treats the consignee as owner or purchaser. In such way the consignor may put himself in a false position, so that, if the rights of an innocent purchaser intervene, he cannot change that position without fraud and damage. There may be other acts by which a consignor may be estopped from asserting his title, but they must be equivalent in force to the ones indicated.

In the present case it does not appear whether the goods consigned, and received on the day of the sale, had been unpacked when the defendant first examined the stock. It is immaterial, except as bearing on the good faith of the defendant. But, if he had then asked for some evidence of ownership, he could only have been shown a bill for goods consigned, and the real character of the Ricciardellis' possession would have been apparent. The defendant chose to rely on the authority of the possessors to sell in their retail business indicated only by the possession described. He would have been protected in a purchase within the scope of such authority, which was real as well as apparent. But the selling out of the whole business was not within the scope of that authority. It does not necessarily follow that a retail dealer, authorized in the ordinary course of business to sell the articles on his shelves, is therefore the owner of the whole business and every article in his possession. If he attempts to sell his business and stock as a single chattel, he enters upon an outside and independent transaction. The purchaser cannot retain, as against the real owner, portions of that stock held under consignment, unless the owner has clothed the consignee with some index of ownership beyond that incident to the fact of a consignment. Where a principal, with full knowledge, permits his factor "to transact the ordinary business of a merchant in his own name, he would even then be bound by his acts only so far as they were within the ordinary mode of transacting the particular branch of business, provided there were no circumstances to show that he permitted him to use his own name with a view of imposing upon others." Potter v. Dennison, 5 Gilman (Ill.) 590, 599.

The plaintiff has done nothing to mislead, unless every consignment is misleading. He gave the Ricciardellis possession, but it was the possession of consignees only. He knew that the goods were to be sold by the consignees in their retail store in connection with their other stock, and that the goods were to be sold at retail in the name of the consignees; but these are the ordinary incidents of a consignment to a retail merchant. Ex parte Dixon, 4 Ch. Div. 133, 136, 137; Slack v. Tucker, 23 Wall. 321, 330, 23 L. Ed. 143; Potter v. Dennison, 5 Gilman (Ill.) 598. The conduct of the plaintiff amounts to a consignment of his goods for sale in the ordinary course of business, and nothing more. The title cannot be defeated by any disposition of the property not within the agency established by such consignment. A consignee cannot transfer the property in payment of his own debt. Benny v. Pegram, 18 Mo. 191, 59 Am. Dec. 298. He must sell in the market where he transacts business. Wootiers v. Kaufman, 73 Tex. 395, 399, 11 S. W. 390; Catlin v. Bell, 4 Camp. 183; Marr v. Barrett, 41 Me. 403. He cannot sell by way of barter. Guerreiro v. Peile, 3 Barn. & Ald. 616, 618. He cannot pledge the goods consigned. Paterson v. Tash, Strange, 1178; Kuckein v. Wilson, 4 Barn. & Ald. 443, 447; Kelly v. Smith, 1 Blatchf. 290, 293, Fed. Cas. No. 7,675; Gray v. Agnew, 95 Ill. 315.

To turn over the goods consigned to another by a sale of his business and stock in trade is as distinctly a disposition foreign to the consignment, and for the benefit of the consignee, as a pledge, or sale in payment of consignee's debt, or a barter. "By the general rule, a factor cannot bind the principal by a disposition of his property out of the ordinary course of business." Bank v. Heilbronner, 108 N. Y. 439, 444, 15 N. E. 701; Warner v. Martin, 11 How. 209, 224, 13 L. Ed. 667. We are asked to treat the ordinary incidents of a bona fide consignment as sufficient indicia of title to enable the consignee to bind his principal by every act of ownership as against an innocent third party. This would involve the reversal of the whole line of cases by which the contract of consignment has been recognized and defined.

The court erred in overruling the claim of the plaintiff that upon the special facts found the goods in question were still the property of the plaintiff, and that he was entitled to the immediate possession thereof. There is error. The judgment of the court of common pleas is reversed, and the cause remanded for further proceedings according to law.

TORRANCE and BALDWIN, JJ., concurred. ANDREWS, C. J., and HALL, J., dissented.[52]

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## H. A. PRENTICE CO. v. PAGE et al.

## DAVIS v. SAME.

(Supreme Judicial Court of Massachusetts, 1895. 164 Mass. 276, 41 N. E. 279.)

Two actions of tort, for the conversion of certain personal property. The cases were tried together and the jury returned verdicts for the plaintiffs. If the instruction given was correct, judgment was to be ordered on the verdicts; otherwise the verdicts were to be set aside and a new trial granted.[53]

MORTON, J. The goods which are the subject of these suits were obtained from the plaintiffs by one Gregg by means of false and fraudulent misrepresentations and forged conditional contracts of sale. After he had thus obtained the goods, Gregg pledged them to the defendants. Although there is nothing in the report of the presiding justice, or in the auditor's report, positively showing that the defendants took them in good faith, it is assumed in the instructions to the jury, and we take it for granted that they did. The H. A. Prentice Company also "trusted Gregg personally with some two thousand dollars' worth of merchandise, and charged the same to him in the regular course of business"; but it is expressly stated in the report of the presiding justice that none of the goods which are the subject of these suits were "ever charged to him or purchased by him in any way, but were all delivered to said Gregg, upon his representation that he had a reliable customer for them," and we assume were all accounted for by him by forged conditional contracts of sale. The facts show that there was a larcenous taking of the goods by Gregg, for which he was afterwards convicted and sentenced.

The defendants, in substance, requested the court to instruct the jury that if the goods were intrusted to Gregg to sell for cash, or on conditional contracts of sale, the defendants were protected by chapter 71, Pub. St., although the goods were obtained from the plaintiffs by Gregg by forgery and fraud.

The court refused to give this instruction, and instructed the jury, in effect, that in order to protect a bona fide pledgee under chapter 71 "the goods or merchandise in the hands of an agent must have been intrusted to" the agent "to sell and dispose of in the ordinary course of business, as a common-law sale."

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[52] A dissenting opinion was delivered by Hall, J.

[53] The statement of facts is abridged.

Without undertaking to say that intrusting goods or merchandise to an agent or factor to sell means, under all circumstances, such a sale as defined by the court, we think, upon the undisputed facts, that the plaintiffs were clearly entitled to recover, and that, therefore, the instructions could have done no harm in the present case.

There was no evidence to show that the goods were intrusted to Gregg to sell for cash, and therefore so much of the request as related to that was inapplicable to the case before the court and jury.

The object of chapter 71, Pub. St., is to protect parties dealing in good faith with factors or agents who have been intrusted with goods or merchandise for sale or consignment. It might be said that goods given, as these were, to one to be delivered by him to parties who he represented had purchased them, were not intrusted to him for sale, but as an agent for delivery merely. But, however that may be, we do not think that the statute applies when goods or merchandise have been procured, by the agent or factor, to be intrusted to him for delivery, under what purport to be conditional contracts of sale, and in consequence of what, in law, constitutes a larceny of them on his part. In such a case the goods cannot be said to have been intrusted to him for sale in any manner, within any fair meaning of those words. It would be a contradiction in terms to say that goods are intrusted for sale to one who steals them. Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; Thacher v. Moors, 134 Mass. 156; Stollenwerck v. Thacher, 115 Mass. 224; Dows v. Bank, 91 U. S. 618, 23 L. Ed. 214; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843.

If the goods have been properly intrusted to an agent for sale, a party afterwards dealing in good faith with the agent will be protected, though the latter may violate his instructions, or, in disposing of or dealing with the goods, conduct himself fraudulently towards his principal. Bank v. Gardner, 15 Gray, 362, 374. But that was not the case here.

In regard to the case of Baines v. Swainson, 4 Best & S. 270, which may seem opposed to the conclusion which we have reached, it should be observed that the English factors' acts (6 Geo. IV, c. 94) simply provide that the goods shall be "intrusted," and not as ours "intrusted for sale," and the fact that they do not provide that they shall be intrusted for sale is adverted to in the argument of counsel and in the opinion given by Crompton, J. Id. 275, 281. See, also, Cole v. Bank, L. R. 10 C. P. 354, 373, 374, where Blackburn, J., says that Willes, J., in delivering judgment in Fuentes v. Montis, L. R. 3 C. P. 268, "speaks of Baines v. Swainson as going to the extreme of the law."

Judgment on the verdicts.[54]

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[54] For a summary of the effect of Factors' Acts, in England and the United States, see Williston, Sales, §§ 318–323. See, also, Wisp v. Hazard, 66 Cal. 459, 6 Pac. 91 (1885).

## SECTION 10.—EFFECT OF RETENTION OF PROPERTY BY SELLER AFTER DELIVERY TO BUYER—"CONDITIONAL SALE." [55]

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### HARKNESS v. RUSSELL.

(Supreme Court of United States. 1886. 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285.)

This is an appeal from the supreme court of Utah. The action was brought in the district court for Weber county, to recover the value of two steam-engines and boilers, and a portable saw-mill connected with each engine. A jury being waived, the court found the facts, and rendered judgment for the plaintiff, Russell & Co. The plaintiff is an Ohio corporation, and by its agent in Idaho, on the second of October, 1882, agreed with a partnership firm by the name of Phelan & Ferguson, residents of Idaho, to sell to them the said engines, boilers, and saw-mills for the price of $4,988, nearly all of which was secured by certain promissory notes, which severally contained the terms of the agreement between the parties. One of the notes (the others being in the same form) was as follows, to-wit:

"Salt Lake City, October 2, 1882.

"On or before the first day of May, 1883, for value received in one sixteen-horse portable engine, No. 1,026, and one portable saw-mill, No. 128, all complete, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, $300, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah Territory, with ten per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership, or possession of said engine and saw-mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co. or his agent has full power to declare this note due, and take possession of said engine and saw-mill when they may deem themselves insecure, even before the maturity of this note; and it is further agreed by the makers hereof that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said saw-mill and engine shall be taken back, Russell & Co. may sell the same at public or private sale without notice, or they may, without sale, indorse the true value of the property on this note, and we agree to pay on the note any balance due thereon, after such indorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt, or claim as exempt, any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force, or that hereafter may be enacted.

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[55] For a list of the states in which recording acts have been enacted, with citation of statutes and cases, see Williston, Sales, § 327.

"P. O., Oxford, Oneida County, Idaho Territory.
"$300. Phelan & Ferguson."

Some of the notes were given for the price of one of the engines with its accompanying boiler and mill, and the others for the price of the other. Some of the notes were paid; and the present suit was brought on those that were not paid. The property was delivered to Phelan & Ferguson on the execution of the notes, and subsequently they sold it to the defendant Harkness, in part payment of a debt due from them to him and one Langsdorf. The defendant, at the time of the sale to him, knew that the purchase price of the property had not been paid to the plaintiff, and that the plaintiff claimed title thereto until such payment was made. The unpaid notes given for each engine and mill exceeded in amount the value of such engine and mill when the action was commenced.

The territory of Idaho has a law relating to chattel mortgages [Act of January 12, 1875], requiring that every such mortgage shall set out certain particulars as to parties, time, amount, etc., with an affidavit attached that it is bona fide, and made without any design to defraud and delay creditors; and requiring the mortgage and affidavit to be recorded in the county where the mortgagor lives, and in that where the property is located; and it is declared that no chattel mortgage shall be valid (except as between the parties thereto) without compliance with these requisites, unless the mortgagee shall have actual possession of the property mortgaged. In the present case no affidavit was attached to the notes, nor were they recorded.

The court found that it was the intention of Phelan & Ferguson and of Russell & Co. that the title to the said property should not pass from Russell & Co. until all the notes were paid.

Upon these facts the court found, as conclusions of law, that the transaction between Phelan & Ferguson and Russell & Co. was a conditional or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan & Ferguson, or from them to the defendant, and gave judgment for the plaintiff. The supreme court of the territory affirmed this judgment. This appeal was taken from that judgment.

Mr. Justice BRADLEY, after stating the facts as above reported, delivered the opinion of the court.

The first question to be considered is whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit, and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: "The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full." If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of "damages and rental for said machinery." This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with or repugnant to what the parties declared their intention to be, namely, to make an executory and conditional contract of sale.

Such contracts are well known in the law and often recognized; and, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases. In Lord Blackburn's Treatise on the Contract of Sale, published 40 years ago, two rules are laid down as established: (1) That where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property; (2) that where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackb. Sales, 152. And it is subsequently added that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property; and, if they do so, their intention is fulfilled." Blackb. Sales, 167. Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the two formulated rules of Lord Blackburn a third rule, which is supported by many authorities, to-wit: (3) "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales, (2d Ed.) 236; Id. (3d Ed.) § 320.

The author cites for this proposition Bishop v. Stillito, 2 Barn. & Ald. 329, note a; Brandt v. Bowlby, 2 Barn. & Adol. 932; Barrow v. Coles, (Lord Ellenborough,) 3 Camp. 92; Swain v. Shepherd, (Baron Parke,) 1 Moody & R. 223; Mires v. Solebay, 2 Mod. 243. In the last case, decided in the time of Charles II, one Alston took sheep to pasture for a certain time, with an agreement that if, at the end of that time, he should pay the owner a certain sum, he should have the sheep. Before the time expired the owner sold them to another person; and it was held that the sale was valid, and that the agreement to sell the sheep to Alston, if he would pay for them at a certain day, did not amount to a sale, but only to an agreement. The other cases were instances of sales of goods to be paid for in cash or securities on delivery. It was held that the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed; the delivery being considered as conditional. This often happens in cases of sales by auction, when certain terms of payment are prescribed, with a condition that, if they are not complied with, the goods may be resold for account of the buyer, who is to account for any deficiency between the second sale and the first. Such was the case of Lamond v. Duvall, 9 Q. B. 1030; and many more cases could be cited. In Ex parte Crawcour, L. R. 9 Ch. Div. 419, certain furniture dealers let Robertson have a lot of furniture upon his paying £10, in cash and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid; and when all the installments were paid, and not before, the furniture was to be the property of Robertson; but, if he failed to pay any of the installments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The court of appeals held that the property did not pass by this agreement, and could not be taken as Robertson's property by his trustee under a liquidation proceeding. The same conclusion was reached in the subsequent case of Crawcour v. Salter, L. R. 18 Ch. Div. 30.

In these cases, it is true, support of the transaction was sought from a custom which prevails in the places where the transactions took place, of hotel-keepers holding their furniture on hire. But they show that the intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankrupt laws, beginning with 21 James I, c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration. The following case presents a fair illustration of the English law as based upon the statutes of bankruptcy. In Horn v. Baker, 9 East, 215, the owner of a term in a distillery, and of the apparatus and utensils employed therein, demised the same to J. & S. in consideration of an annuity to be paid to the owner and his wife during their several lives, and upon their death the lessees to have the liberty of purchasing the residue of the term, and the apparatus and utensils, with a proviso for re-entry if the annuity should at any time be two months in arrear. The annuity having become in arrear for that period, instead of making entry for condition broken, the wife and administrator of the owner brought suit to recover the arrears, which was stopped by the bankruptcy of J. & S. The question then arose whether the utensils passed to the assignees of J. & S. under the bankrupt act, as being in their possession, order, and disposition as reputed owners; and the court held that they did; but that, if there had been a usage in the trade of letting utensils with a distillery, the case would have admitted a different consideration, since such a custom might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of the goods. This case was followed in Holroyd v. Gwynne, 2 Taunt. 176.

This presumption of property in a bankrupt arising from his possession and reputed ownership became so deeply imbedded in the English law that in process of time many persons in the profession, not adverting to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence in some states in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned either as being fraudulent and void as against creditors, or as amounting, in effect, to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and therefore there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud; and, when this is charged, all the circumstances of the case, this included, will be open for the consideration of a jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect.

In this country, in states where no such statute as the English act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

In Hussey v. Thornton, 4 Mass. 405, 3 Am. Dec. 224, (decided in 1808,) where goods were delivered on board of a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held (Chief Justice Parsons delivering the opinion) that the property did not pass, and that the goods could not be attached by the creditors of the vendee. This case was followed in 1822 by that of Marston v. Baldwin, 17 Mass. 606, which was replevin against a sheriff for taking goods which the plaintiff had agreed to sell to one Holt, the defendant in the attachment; but by the agreement the property was not to vest in Holt until he should pay $100, (part of the price,) which condition was not performed, though the goods were delivered. Holt had paid $75, which the plaintiff did not tender back. The court held that it was sufficient for the plaintiff to be ready to repay the money when he should be requested, and a verdict for the plaintiff was sustained.

In Barrett v. Pritchard, 2 Pick. (Mass.) 512, 515–516 (13 Am. Dec. 449), the court said: "It is impossible to raise a doubt as to the intention of the parties in this case, for it is expressly stipulated that 'the wool, before manufactured, after being manufactured, or in any stage of manufacture, shall be the property of the plaintiff until the price be paid.' It is difficult to imagine any good reason why this agreement should not bind the parties. * * * The case from Taunton (Holroyd v. Gwynn) was a case of a conditional sale; but the condition was void as against the policy of the statute 21 Jac. I, c. 19, § 11. It would not have changed the decision in that case if there had been no sale; for, by that statute, if the true owner of goods and chattels suffers another to exercise such control and management over them as to give him the appearance of being the real owner, and he becomes bankrupt, the goods and chattels shall be treated as his property, and shall be assigned by the commissioners for the benefit of his creditors. The case of Horn v. Baker, 9 East, 215, also turned on the same point, and nothing in either of these cases has any bearing on the present question."

In Coggill v. Hartford & N. H. R. Co., 3 Gray (Mass.) 545–547, the rights of a bona fide purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held, in an able opinion delivered by Mr. Justice Bigelow, that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price passes no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith, and without notice. The learned justice commenced his opinion in the following terms: "It has long been the settled rule of law in this commonwealth that a sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors claiming to hold them under attachments." He then addresses himself to a consideration of the rights of a bona fide purchaser from the vendee, purchasing without notice of the condition on which the latter holds the goods in his possession; and he concludes that they are no greater than those of a creditor. He says: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy." This case was followed in Sargent v. Metcalf, 5 Gray (Mass.) 306, 66 Am. Dec. 368; Deshon v. Bigelow, 8 Gray (Mass.) 159; Whitney v. Eaton, 15 Gray (Mass.) 225; Hirschorn v. Canney, 98 Mass. 149; and Chase v. Ingalls, 122 Mass. 381; and is believed to express the settled law of Massachusetts.

The same doctrine prevails in Connecticut, and was sustained in an able and learned opinion of Chief Justice Williams, in the case of Forbes v. Marsh, 15 Conn. 384, (decided in 1843,) in which the principal authorities are reviewed. The decision in this case was followed in the subsequent case of Hart v. Carpenter, 24 Conn. 427, where the question arose upon the claim of a bona fide purchaser.

In New York the law is the same, at least so far as relates to the vendee in a conditional sale and to his creditors; though there has been some diversity of opinion in its application to bona fide purchasers from such vendee. As early as 1822, in the case of Haggerty v.

Palmer, 6 Johns. Ch. (N. Y.) 437, where an auctioneer had delivered to the purchaser goods sold at auction, it being one of the conditions of sale that indorsed notes should be given in payment, which the purchaser failed to give, Chancellor Kent held that it was a conditional sale and delivery, and gave no title which the vendee could transfer to an assignee for the benefit of creditors; and he said that the cases under the English bankrupt act did not apply here. The chancellor remarked, however, that "if the goods had been fairly sold by P., [the conditional vendee,] or if the proceeds had been actually appropriated by the assignees before notice of this suit and of the injunction, the remedy would have been gone."

In Strong v. Taylor, 2 Hill (N. Y.) 326, Nelson, C. J., pronouncing the opinion, it was held to be a conditional sale where the agreement was to sell a canalboat for a certain sum, to be paid in freighting flour and wheat, as directed by the vendor, he to have half the freight until paid in full, with interest. Before the money was all paid the boat was seized under an execution against the vendee; and, in a suit by the vendor against the sheriff, a verdict was found for the plaintiff, under the instruction of the court, and was sustained in banc upon the authority of the Massachusetts case of Barrett v. Pritchard, 2 Pick. (Mass.) 512, 13 Am. Dec. 449.

In Herring v. Hoppock, 15 N. Y. 409, 411, 414, the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee, and a note at six months given therefor; but it was expressly understood that no title was to pass until the note was paid; and if not paid, Herring, the vendor, was authorized to retake the safe, and collect all reasonable charges for its use. The sheriff levied on the safe as the property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of Herring. Paige, J., said: "Whenever there is a condition precedent attached to a contract of sale which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition or the seller waives it." Comstock, J., said that, if the question were new, it might be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt in the nature of a personal mortgage; but he considered the law as having been settled by the previous cases, and the court unanimously concurred in the decision.

In the cases of Smith v. Lynes, 5 N. Y. 41, and Wait v. Green, 35 Barb. (N. Y.) 585, on appeal 36 N. Y. 556, it was held that a bona fide purchaser, without notice from a vendee who is in possession under a conditional sale, will be protected as against the original vendor. These cases were reviewed, and, we think, substantially overruled, in the subsequent case of Ballard v. Burgett, 40 N. Y. 314, in which separate elaborate opinions were delivered by Judges Grover and Lott. This decision was concurred in by Chief Judge Hunt, and Judges Woodruff, Mason, and Daniels; Judges James and Murray dissenting. In that case Ballard agreed to sell to one France a yoke of oxen for a price agreed on, but the contract had the condition "that the oxen were to remain the property of Ballard until they should be paid for." The oxen were delivered to France, and he subsequently sold them to the defendant Burgett, who purchased and received them without notice that the plaintiff had any claim to them. The court sustained Ballard's claim; and subsequent cases in New York are in harmony with this decision. See Cole v. Mann, 62 N. Y. 1; Bean v. Edge, 84 N. Y. 510.

We do not perceive that the case of Dows v. Kidder, 84 N. Y. 121, is adverse to the ruling in Ballard v. Burgett. There, although the plaintiffs stipulated that the title to the corn should not pass until payment of the price, (which was to be cash, the same day,) yet they indorsed and delivered to the purchaser the evidence of title, namely, the weigher's return, to enable him to take out the bill of lading in his own name, and use it in raising funds to pay the plaintiff. The purchaser misappropriated the funds, and did not pay for the corn. Here the intent of both parties was that the purchaser might dispose of the corn, and he was merely the trustee of the plaintiff, invested by him with the legal title. Of course, the innocent party who purchased the corn from the first purchaser was not bound by the equities between him and the plaintiff.

The later case of Parker v. Baxter, 86 N. Y. 586, was precisely similar to Dows v. Kidder; and the same principle was involved in Farwell v. Importers' & Traders' Bank, 90 N. Y. 483, where the plaintiff delivered his own note to a broker to get it discounted, and the latter pledged it as collateral for a loan made to himself. The legal title passed; and although, as between the plaintiff and the broker, the former was the owner of the note and its proceeds, yet that was an equity which was not binding on the innocent holder.

The decisions in Maine, New Hampshire, and Vermont are understood to be substantially to the same effect as those of Massachusetts and New York; though by recent statutes in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property, bargained and delivered to another, shall remain the property of the vendor, shall be valid against third persons without notice. George v. Stubbs, 26 Me. 243; Sawyer v. Fisher, 32 Me. 28; Brown v. Haynes, 52 Me. 578; Boynton v. Libby, 62 Me. 253; Rogers v. Whitehouse, 71 Me. 222; Sargent v. Gile, 8 N. H. 325; McFarland v. Farmer, 42 N. H. 386; King v. Bates, 57 N. H. 446; Hefflin v. Bell, 30 Vt. 134; Armington v. Houston, 38 Vt. 448, 91 Am. Dec. 366; Fales v. Roberts, 38 Vt. 503; Duncan v. Stone, 45 Vt. 123; Moseley v. Shattuck, 43 Iowa, 540; Thorpe v. Fowler, 57 Iowa, 541, 11 N. W. 3.

The same view of the law has been taken in several other states. In New Jersey, in the case of Cole v. Berry, 42 N. J. Law, 308, 36 Am. Rep. 511, it was held that a contract for the sale of a sewing-machine to be delivered and paid for by installments, and to remain the property of the vendor until paid for, was a conditional sale, and gave the vendee no title until the condition was performed; and the cases are very fully discussed and distinguished.

In Pennsylvania the law is understood to be somewhat different. It is thus summarized by Judge Depue, in the opinion delivered in Cole v. Berry, 42 N. J. Law, 314, where he says: "In Pennsylvania a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid; it being held that in the former instance property does not pass as in favor of creditors and purchasers of the bailee, but that in the latter instance delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferable to bona fide purchasers. Chamberlain v. Smith, 44 Pa. 431; Rose v. Story, 1 Pa. 190 [44 Am. Dec. 121]; Martin v. Mathiot, 14 Serg. & R. (Pa.) 214 [16 Am. Dec. 491]; Haak v. Linderman, 64 Pa. 499 [3 Am. Rep. 612]." But, as the learned judge adds: "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment on the same footing,—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent per se."

In this connection, see the case of Copland v. Bosquet, 4 Wash. C. C. 588, Fed. Cas. No. 3,212, where Mr. Justice Washington and Judge Peters (the former delivering the opinion of the court) sustained a conditional sale and delivery against a purchaser from the vendee, who claimed to be a bona fide purchaser without notice.

In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. The latest reported case brought to our attention is that of Call v. Seymour, 40 Ohio St. 670, which arose upon a written contract contained in several promissory notes given for installments of the purchase money of a machine, and resembling very much the contract in the case now under consideration. Following the note, and as a part of the same document, is this condition: "The express conditions of the sale and purchase of the separator and horse-power for which this note is given, is such that the title, ownership, or possession does not pass from the said Seymour, Sabin & Co. until this note, with interest, is paid in full. The said Seymour, Sabin & Co. have full power to declare this note due, and take possession of said separator and horse-power, at any time they may deem this note insecure, even before the maturity of the note, and to sell the said machine at public or private sale, the proceeds to be applied upon the unpaid balance of the purchase price." The machine was seized under an attachment issued against the vendee, and the action was brought by the vendor against the constable who served the attachment. The case was fully argued, and the authorities pro and con duly considered by the court, which sustained the condition expressed in the contract, and affirmed the judgment for the plaintiff. See, also, Sanders v. Keber, 28 Ohio St. 630.

The same law prevails in Indiana. Shireman v. Jackson, 14 Ind. 459; Dunbar v. Rawles, 28 Ind. 225, 92 Am. Dec. 311; Bradshaw v. Warner, 54 Ind. 58; Hodson v. Warner, 60 Ind. 214; McGirr v. Sell, 60 Ind. 249. The same in Michigan. Whitney v. McConnell, 29 Mich. 12; Smith v. Lozo, 42 Mich. 6, 3 N. W. 227; Marquette Manuf'g Co. v. Jeffrey, 49 Mich. 283, 13 N. W. 592. The same in Missouri. Ridgeway v. Kennedy, 52 Mo. 24; Wangler v. Franklin, 70 Mo. 659; Sumner v. Cottey, 71 Mo. 121. The same in Alabama. Fairbanks v. Eureka, 67 Ala. 109; Sumner v. Woods, 67 Ala. 139, 42 Am. Rep. 104. The same in several other states. For a very elaborate collection of cases on the subject, see Mr. Bennett's note to Benj. Sales, (4th Ed.) § 320, pp. 329-336; and Mr. Freeman's note to Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62. It is unnecessary to quote further from the decisions. The quotations already made show the grounds and reasons of the rule.

The law has been held differently in Illinois, and very nearly in conformity with the English decisions under the operation of the bankrupt law. The doctrine of the supreme court of that state is that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the mean time, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a bona fide purchaser, or an execution creditor of the latter, is entitled to protection as against the claim of the original vendor. Brundage v. Camp, 21 Ill. 330; McCormick v. Hadden, 37 Ill. 370; Murch v. Wright, 46 Ill. 488, 95 Am. Dec. 455; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Lucas v. Campbell, 88 Ill. 447; Van Duzor v. Allen, 90 Ill. 499. Perhaps the statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. This statute declares that "no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois, and we have felt bound to observe it as such.

In the case of Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 671, 23 L. Ed. 1003, where a Rhode Island company leased to certain Illinois railroad contractors a locomotive engine and tender at a certain rent, payable at stated times during the ensuing year, with an agreement that, if the rent was duly paid, the engine and tender should become the property of the lessees, and possession was delivered to them, this court, being satisfied that the transaction was a conditional sale, and that, by the law of Illinois, the reservation of title by the lessors was void as against third persons unless the agreement was recorded, (which it was not in proper time,) decided that a levy and sale of the property in Illinois, under a judgment against the lessees, were valid, and that the locomotive works could not reclaim it. Mr. Justice Davis, delivering the opinion of the court, said: "It was decided by this court in Green v. Van Buskirk, 5 Wall. 307, and 7 Wall. 139, that the liability of property to be sold under legal process issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. * * * The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by the statute. The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act. Rev. St. Ill. 1874, 711, 712." The Illinois cases are then referred to by the learned justice to show the precise condition of the law of that state on the subject under consideration.

The case of Hervey v. Rhode Island Locomotive Works is relied on by the appellants in the present case as a decision in their favor; but this is not a correct conclusion, for it is apparent that the only points decided in that case were—First, that it was to be governed by the law of Illinois, the place where the property was situated; secondly, that by the law of Illinois the agreement for continuing the title of the property in the vendors after its delivery to the vendees, whereby the latter became the ostensible owners, was void as against third persons.

This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other states. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are valid and lawful as well against third persons as against the parties to the contract.

The appellants, however, rely with much confidence on the decision of this court in Herryford v. Davis, 102 U. S. 235, 243, 26 L. Ed. 160, a case coming from Missouri, where the law allows and sustains conditional sales. But we do not think that this case, any more than that of Hervey v. Rhode Island Locomotive Works, will be found to support their views. The whole question in Herryford v. Davis was as to the construction of the contract. This was in the form of a lease, but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the statute of Missouri requiring mortgages of personal property to be recorded in order to be valid as against third persons. It was conceded by the court, in the opinion delivered by Mr. Justice Strong, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid.. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. Mr. Justice Strong says: "The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company."

The whole residue of the opinion is occupied with the discussion of the true construction of the contract; and, as we have stated, the conclusion was reached that it was not really a lease nor a conditional sale, but an absolute sale, with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons.

But whatever the law may be with regard to a bona fide purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a bona fide purchaser without notice. The court below find that, at the time of and prior to the sale, he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners; but as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care, and to state what we regard as the general rule of law where it is not affected by local statutes or local decisions to the contrary.

It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid as well against third persons as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made, has been performed.

The judgment of the supreme court of the territory of Utah is affirmed.

## CARPENTER v. SCOTT.

(Supreme Court of Rhode Island, 1881. 13 R. I. 477.)

MATTESON, J. This is an action of replevin to recover possession of a rolling mill, attached by the defendant, a deputy sheriff. On the 17th day of November, 1879, the Willets Manufacturing Company delivered to John Anthony the mill in question under an agreement, purporting to be a lease, by which Anthony was to pay them for the mill five hundred dollars, in twenty monthly installments of twenty-five dollars each, the first on the date named and the rest on the 17th day of each succeeding month, with interest at seven per cent. per annum. If Anthony failed to make any payment within five days after the date specified for such payment, the Willets Manufacturing Company might terminate the contract and take immediate possession of the mill. At the expiration of the lease, Anthony, having complied with its conditions, was to receive a bill of sale of the mill.

At the date of the delivery of the mill to Anthony, he was a member of a partnership composed of Thomas Anthony, Thomas J. Linton, and himself. The business of the partnership was at that time, and until the 11th day of March 1880, continued to be, transacted in the name of John Anthony. The contract for the mill, though in his name, was for the benefit of the partnership, and the partnership funds were used for the first payment, and for the successive payments of the installments as they became due. On the 11th day of March, 1880, the partnership, under the name of John Anthony & Co., executed and delivered to the plaintiff a mortgage, signed by each of the partners, and purporting to convey, besides their other property, the mill in question, "subject to a certain claim of the Willets Manufacturing Company." In July following John Anthony withdrew from the partnership, and the business after that date was conducted under the name of Thomas Anthony & Co. On the 22d day of June, 1881, the last installment of the rent, or price, of the mill was paid, and the Willets Manufacturing Company gave a receipted bill of sale of it to Thomas Anthony & Co. This bill of sale named John Anthony as the vendee, and acknowledged payment of the price by Thomas Anthony & Co., for John Anthony. On the same day the Willets Manufacturing Company brought suit against John Anthony for an indebtedness of his to them, and delivered the writ to the defendant for service, which was made in part by attaching the mill replevied in this suit.

The question raised by the foregoing facts is, whether the mortgage to the plaintiff, in so far as it purports to convey the rolling mill, is valid as against the attachment of the Willets Manufacturing Company. We think it is. Such a transaction as that above described, by which the mill in question passed into the possession of John Anthony, though in form a lease, is regarded in law as a conditional sale. Goodell v. Fairbrother, 12 R. I. 233, 34 Am. Rep. 631; Currier v. Knapp, 117 Mass. 324; Greer v. Church & Co., 13 Bush (Ky.) 430, 433, 434. Under it the vendee acquires, not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale, or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or in the event that he has sold, or mortgaged it, in his vendee, or mortgagee, without further bill of sale. Day v. Basset, 102 Mass. 445, 447; Crompton v. Pratt, 105 Mass. 255, 258; Currier v. Knapp, 117 Mass. 324, 325, 326; Chace v. Ingalls, 122 Mass. 381, 383. It follows from these principles, that immediately on payment of the last installment of the price, the title to the rolling mill vested in John Anthony, or in him and his copartners, it is immaterial which, and that, thereupon, the plaintiff's mortgage became valid, and entitled to priority over the attachment of the Willets Manufacturing Company subsequently made.

The defendant contends that the plaintiff's mortgage is invalid as against the attachment, because the plaintiff had never taken possession of the rolling mill under it. In support of this claim he cites Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518, and Cook v. Corthell, 11 R. I. 482, 23 Am. Rep. 518. These cases are, however, widely different from the present. They do, indeed, hold that, at law, a mortgage of personal property to be subsequently acquired conveys no title, unless possession of the property when acquired is given to, or taken by, the mortgagee. They rest upon the familiar maxim, that no one can grant, or charge, that which he does not have. At the execution of the mortgages the mortgagors had no interest whatever in the property, the title to which was involved in these suits. It was property which was to come into their possession, and in which they were to acquire an interest, in the future, and which might not have been in existence, even, when the mortgages were made. In the present case, on the contrary, the mortgagors at the making of the mortgage had the possession of the property, with the right to its possession and use, and the right to become its absolute owners on complying with the conditions of the sale. These rights constituted an actual, present interest in the property, which, as we have seen above, is capable of transfer by sale or mortgage.

In accordance with the stipulation of the parties, judgment is rendered for the plaintiff for costs.

Judgment for plaintiff for costs.

## HERVEY v. DIMOND.

(Supreme Court of New Hampshire, 1892. 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673.)

Replevin, of household furniture. Facts agreed. February 5, 1891, the plaintiffs delivered from their place of business, in Boston, to one Fred D. Story, at Penacook, a lot of household furniture, under a contract in writing, in which it was stipulated that he had hired and received the same of the plaintiffs, and would pay them, for the rent and use thereof, the sum of $5 per month, until the price, $77.38, should be paid; that the plaintiffs were to remain absolute owners of the property until the full price should be paid, when they were to "release their claim and right in the goods above leased" to Story. The contract further provided that if Story should fail to pay the rent as stipulated, or should remove the goods from Penacook, or sell or underlet them, or suffer them to be attached, he would thereby forfeit all right to the goods, and to the further use of them, and to all moneys paid, and that the plaintiffs might enter the premises of Story, and remove the same. August 14, 1891, Story paid, and the plaintiffs accepted, a monthly installment, making the whole amount paid by him under the contract $30. On that day, the defendant, as deputy sheriff, attached the goods, as the property of Story, in the freight station at Penacook, awaiting shipment to Boston, on a writ in favor of one Whitaker. In answer to a letter from the defendant inquiring the amount due them upon the contract, the plaintiffs replied, August 18th, that the balance due was $47.38; that they had given Story permission to move the goods to East Boston; and concluded, "So, we do not presume that you would care to detain the goods knowing they were leased property."

A demand made September 8th for the goods was refused. On that day, Whitaker, the attaching creditor, tendered them $47.38, which was refused. Later, the same day, the defendant demanded in writing, of the plaintiffs, an account, under oath, of the sum due them by virtue of any contract with Story. The plaintiffs never made any reply to the demand. September 12, 1891, they replevied the goods, and took them to Boston.

Smith, J. The contract (called a "lease") does not, in legal effect, differ materially from a conditional sale. Although, by the contract, it was stipulated that the plaintiffs should remain absolute owners of the goods until the full price should be paid, it does not follow that Story had no interest in the property. He had the right to pay the balance due, and become the owner of the property. While the plaintiffs remained the general owners until the full price should be paid, Story's interest was that of a special owner, which the law recognizes and protects. It was an assignable and attachable interest, his assignee or attaching creditor acquiring the same rights as he had. If Story failed to make the monthly payments according to the contract, and the plaintiffs might for that cause have asserted a forfeiture, they waived the default by accepting an installment August 14th.

Although the attachment was nominally of the property, yet it plainly appears that Whitaker did not intend to attach in disregard of the plaintiffs' rights, and he fully recognized them by tendering the amount due. If necessary, the officer's return can be amended to conform to the fact. By the tender of the amount due the plaintiffs, their title to the goods became vested in Story, subject to Whitaker's attachment. As Whitaker seasonably tendered the amount of their claim, the defendant is entitled to judgment for the value of the property, and for his costs. A few of the authorities in support of these views are Sargent v. Gile, 8 N. H. 325; Porter v. Pettengill, 12 N. H. 299; Bailey v. Colby, 34 N. H. 29, 66 Am. Dec. 752; McFarland v. Farmer, 42 N. H. 386; Partridge v. Philbrick, 60 N. H. 556.

There is a clause in the contract that Story, by suffering the property to be attached, would forfeit all right to and use of the goods. It does not appear that Story procured or advised the attachment to be made. Whether he can be said to have "suffered" the attachment to be made, when it was not made by his procurement or with his consent, and when, so far as appears, he could not prevent it, is a question not made. The plaintiffs have not contended or suggested that Story's interest in the goods was terminated by the attachment.

Case discharged. All concurred.[56]

## SPOONER v. CUMMINGS.

## SAME v. HANDLEY.

(Supreme Judicial Court of Massachusetts, 1890. 151 Mass. 313, 23 N. E. 839.)

Two actions of replevin, of a horse and of a mare respectively. The answer in each case contained a general denial, and that in the second case also set up fraud and laches on the part of the plaintiff, and an authority from him to sell the mare to the defendant. Trial in the Superior Court, before Aldrich, J., who allowed a bill of exceptions in each case.

In the first case there was evidence that on May 26, 1888, the plaintiff, who then owned the horse in question, sold it to one Pope, who bought and received it upon an agreement in writing signed by him, which recited that the horse was to be and remain the entire and absolute property of the plaintiff until paid for in full by Pope; that the plaintiff was a dealer in horses, and had sold horses to Pope for several years; and that Pope, before paying the plaintiff for the horse in question, resold it to the defendant, on June 2, 1888, and received payment for it from him.

The plaintiff contended and asked the judge to rule, that the defendant, under his answer, could only be permitted to show that the conditional agreement was not made, or that the horse had been paid for by Pope. The judge declined so to rule, but ruled that the defendant might be permitted to show that the plaintiff gave to Pope authority, express or implied, by the course of dealing between them, to sell the horse before payment; and the plaintiff excepted.

The defendant thereupon introduced evidence which showed that for a long period the plaintiff and Pope had engaged in similar transactions, and that, according to the course of dealing between them, Pope purchased horses from the plaintiff, and gave him similar conditional agreements in writing; and that the plaintiff would urge Pope to sell such horses, and the latter, before paying for them, would resell them and send money to the plaintiff, which the latter would apply as he saw fit on any of the agreements. One Trull was permitted to testify against the plaintiff's objection, that about the middle of June, 1888, the plaintiff told him to tell Pope that he had a carload of horses coming, and to sell as many horses as he could.

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[56] As to the rights of the trustee in bankruptcy of a conditional vendee, see In re Williamsburg Knitting Mill (D. C.) 190 Fed. 871 (1911); In re Kreuger (D. C.) 199 Fed. 367 (1912).

The judge gave an instruction among others to the jury, which permitted them to find, from the course of dealing between the parties, that the plaintiff had given Pope implied authority to sell the horse in question; and further instructed them, that, if the plaintiff, notwithstanding the conditional agreement between the parties, consented that Pope might sell the horse to the defendant, trusting that Pope would send him the money in payment for it, he could not set up the conditional agreement with Pope as against the defendant. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

KNOWLTON, J.[57] Under the answer of the defendant, any evidence was competent which tended to contradict the contention of the plaintiff that the title to the horse and the right of possession were in him. Verry v. Small, 16 Gray, 121, 122; Whitcher v. Shattuck, 3 Allen, 319.

The defendant was not a party to the written contract between the plaintiff and Pope, but claimed outside of it, and in support of his own title he might show by parol what was the real arrangement between them, even if it differed from that contained in the writing. Kellogg v. Tompson, 142 Mass. 76, 6 N. E. 860. If the plaintiff expressly or impliedly authorized the sale by Pope to him, he, having bought in good faith from the apparent owner, acquired a good title. It is immaterial whether his right depends upon an actual authority to make the sale, or upon facts which estop the plaintiff from denying the validity of the sale. Burbank v. Crooker, 7 Gray, 158, 159, 66 Am. Dec. 470; Haskins v. Warren, 115 Mass. 514, 538; Tracy v. Lincoln, 145 Mass. 357, 14 N. E. 122; Bank v. Buffinton, 97 Mass. 498; Fowler v. Parsons, 143 Mass. 401, 9 N. E. 799.

The testimony as to the course of dealing between the plaintiff and Pope, involving a long series of transactions, all of the same kind, and conducted generally in the same way, was competent, as tending to show an expectation and understanding on the part of both that Pope would sell the horses which he bought of the plaintiff as he had opportunity, and that he was impliedly authorized to sell this horse to the defendant. Hubbell v. Flint, 13 Gray, 277; Bank v. Goodsell, 107 Mass. 149; Lynde v. McGregor, 13 Allen, 172; Bragg v. Railroad Corp., 9 Allen, 54. The testimony of Trull, as to the message sent to Pope by the plaintiff about the middle of June, was of a conversation so soon after the sale of June 2d to the defendant that the judge might well admit it in his discretion. It related to the general course of dealing, of which the sale to Pope of the horse replevied was a part.

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[57] The statement and the opinion in the second case are omitted.

The jury were rightly permitted to find that the plaintiff impliedly authorized the sale by Pope to the defendant, and that he was estopped to deny the validity of the title which the defendant acquired, relying on Pope's possession and apparent ownership.

Exceptions overruled.[58]

## SECTION 11.—EFFECT OF RETENTION OF POSSESSION BY SELLER AFTER TRANSFER OF PROPERTY TO BUYER

### EDWARDS v. HARBEN.

(Court of King's Bench, 1788. 2 Term Rep. 587.)

Assumpsit for goods sold to the defendant's testator. The defendant pleaded that he was not executor, nor had ever administered as such; and, secondly, that he had fully administered, &c. Replication, that he had administered divers goods &c. of the testator; and issue thereon. And to the second plea, that the defendant, at the time of exhibiting the plaintiff's bill, had, and still has, goods and chattels of the deceased in his hands sufficient to satisfy the plaintiff's demands; and issue thereon. At the trial at the last Assizes at East Grinstead, Sussex, a verdict was found for the plaintiff with £22. 18s. 6d. damages and 40s. costs, subject to the opinion of this court on the following case:

William Tempest Mercer in his life-time, and before the time of the execution of the bill of sale herein-after mentioned, was indebted to the plaintiff in the sum of £22. 18s. 6d. for goods sold and delivered, which sum still remains due to the plaintiff. William Tempest Mercer, at the time of the execution of the said bill of sale, was likewise indebted to the defendant in the sum of £191. for money lent. On the 27th of March 1786 Tempest Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at Lewes, by way of security for the said debt. The defendant refused to accept of the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid; to which Tempest Mercer agreed, and accordingly on the same day executed a bill of sale in the common form, by which Mercer bargained and sold to the defendant for ever his household furniture, medicines, stock in trade [particularly specifying them], and all and every other the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes. Immediately upon the execution of the bill of sale possession was delivered to the defendant in the manner described therein, viz. by the delivery of one cork screw in the name of the whole, but in no other manner whatsoever. All the effects described in the bill of sale remained in the possession of William Tempest Mercer until the time of his death, which happened on the 7th of April, 1786. On the 8th of April, 1786, being before the expiration of fourteen days from the execution of the bill of sale, the defendant entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for £236. 7s. 5d. William Tempest Mercer died intestate, and no letters of administration were taken out to the deceased by the defendant, or by any other person, before the commencement of this action. The question for the opinion of the court is, whether the defendant is entitled to retain the produce of the said effects, or at least the value of £191., the consideration of the bill of sale: or whether the bill of sale is void as against the creditors of William Tempest Mercer; and the plaintiff in this action is entitled to recover his debt of £22. 18s. 6d. against the defendant, as executor de son tort.

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[58] "If, however, the resale made by the buyer is of a totally different character from that which the seller authorized, or is estopped to deny that he authorized, this principle does not apply." Williston, Sales, § 329. See Burbank v. Crooker, 7 Gray, 158, 66 Am. Dec. 470 (1856). But compare Bass, Heard & Howle v. International Harvester Co., 169 Ala. 154, 53 South. 1014, 33 L. R. A. (N. S.) 374 (1910).

As to estoppel of seller in favor of buyer's creditors, see Flint Wagon Works v. Maloney (Del.) 81 Atl. 502 (1911); note, 12 Columbia Law Rev. 180; Williston, Sales, § 329.

Buller, J. This is an action brought by the plaintiff, who is a creditor of Mercer, against the defendant as executor. It does not appear by the case that any other goods than those mentioned in the bill of sale came to the defendant's hands. The bill of sale is dated on the 27th March, 1786, and is a general bill of sale of all the defendant's household furniture and stock in trade. This bill of sale is to take effect immediately on the face of it: but there was an agreement between Mercer and the defendant, that the goods should not be sold till the expiration of fourteen days from the date of its execution; and no possession was actually taken till after the death of Mercer, which happened within the fourteen days: but there was a formal delivery of a cork screw in the name of the whole. On this case two questions arise: First, whether this bill of sale be void or not; and Secondly, if void, whether the defendant by having taken these goods under the bill of sale, made himself liable as an executor de son tort.

The first question came before the court in the last term in the case of Bamford v. Baron, 2 Term. Rep. 594, note, on a motion for a new trial from the Northern circuit: and after hearing that case argued, we thought it right to take the opinion of all the judges upon it. Accordingly we consulted with all the judges, who are unanimously of opinion that unless possession accompanies and follows the deed, it is fraudulent and void; I lay stress upon the words "accompanies and follows," because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases on this subject; from which it appears to me that the principle which I have stated never admitted of any serious doubt. So long ago as in the case in Bulstrode, the court held that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be conditional, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as accompanying and following the deed.

That case has been universally followed by all the cases since. One of the strongest is quoted in Bucknal and Others v. Roiston, Pr. in Chan. 287; there one Brewer, having shipped a cargo of goods, borrowed of the plaintiff £600. on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff; there Sir E. Northey cited a case "where a man took out execution against another; by agreement between them the owner was to keep the possession of them upon certain terms, and afterwards another obtained judgment against the same man, and took the goods in execution: and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property." And he said it had been ruled forty times in his experience at Guildhall, that, if a man sell goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The lord chancellor held in the principal case that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage, and Brewer's keeping possession of them was not to give a false credit to him as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the Chancellor in that case proceeded on the distinction which I have taken; he supported the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance per se as makes the transaction fraudulent in point of law: that is the point which we have considered, and we are all of opinion that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent. On the other hand there are cases, where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed. Such was the case of Lord Cadogan v. Kennet, Cowp. 432; because there the possession followed the deed. So also the case of Haslington and Another v. Gill and Another, Sheriff of Middlesex, Tr. 24 Geo. III, B. R.; there personal property, consisting (inter alia) of some cows, was settled on the marriage of the plaintiff's wife on certain trusts; and the court held that only those which were purchased after the marriage could be taken to satisfy the debts of the husband.

The second question then is, whether the defendant's having taken possession of these goods after Mercer's death, though under the bill of sale, will make him an executor de son tort. The two cases, which were cited by the defendant's counsel, are decisive of this point. In Bac. Abr. (2 Bac. Abr. 605) it is said "if a man make a deed of gift of his goods in his life-time by covin to oust his creditors of their debts, yet after his death the vendee shall be charged for them." There too the possession was delivered to the vendee. To support this doctrine 13 H. IV, 4, b, Rol. Abr. 549, are both quoted. Then in what manner shall he be charged? He can only be charged as executor; because any intermeddling with the intestate's effects makes him so. The cases in Cro. Fa. and Yelv. cited at the bar prove it, and state the manner in which he shall be charged. There is also another strong case on this point in Dyer, Dy. 166, b. In short every intermeddling after the death of the party makes the person so intermeddling an executor de son tort.

GROSE, J., observed that it was unnecessary to repeat what had been said from the bench; but said that he was perfectly satisfied that the law was as had been stated.

Postea to the plaintiff.[59]

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[59] "Sales made by debtors in fraud of creditors are usually regarded as being governed by the statute of 13 Eliz. c. 5, and the decisions made under it; but other statutes had been previously passed on the same subject, and in 1776 Lord Mansfield, in Cadogan v. Kennet [Cowp. 432], said that 'the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4. The former of these statutes relates to creditors only; the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud.'

"The statute of 13 Eliz. c. 5 [made perpetual by 29 Eliz. c. 5], which merely declared the common law [Twyne's Case, 1601, 3 Co. 80a], provided among other things that all alienations of goods and chattels made to the intent

## MARTINDALE et al. v. BOOTH.

(Court of King's Bench, 1832. 3 Barn. & Ad. 498.)

Trespass for taking away and converting furniture, goods, and chattels of the plaintiffs. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Trinity term, 1829, the jury found a verdict for the plaintiffs for £93. 16s., subject to the opinion of this Court on the following case:

Before the 8th of May 1828, one W. G. Priest, who kept the Peacock Tavern in Maiden Lane, Middlesex, was indebted to the plaintiffs, wine and spirit merchants, in £10. for wine and spirits. Priest having applied to them for a further supply of wine upon credit, and for a loan of money, the plaintiffs refused to give him any further credit, or to lend him any money unless he would give them satisfactory security. Priest then proposed to execute a bill of sale to them of the furniture and fixtures in the Peacock Tavern as such security, and the plaintiffs agreed to give him credit thereupon to the extent of £200. After Priest and the plaintiffs had agreed to give and accept such security, but before the bill of sale was actually executed, the plaintiffs, upon the faith of such agreement, advanced to Priest £30. in money and to the amount of £60. in wine and spirits. and in two days afterwards, viz. the 8th of May 1828, in pursuance of the agreement, Priest executed and delivered to the plaintiffs a bill of sale, reciting that he, Priest, was indebted to the plaintiffs in the sum of £100. for money advanced and goods sold and delivered and stating that, in consideration thereof, he granted, bargained. sold, and assigned unto the plaintiffs all the household goods, furniture, &c., in and about the premises called the Peacock Tavern, to hold to the proper use and behoof of the plaintiffs for ever, subject to the condition thereinafter contained: proviso, that if Priest should pay the said sum of £100. with lawful interest thereon by instalments, that is to say £25. on the 7th of June then next, £25. on the 7th of May next, and £50. the residue thereof, on the 7th of November, 1829, the deed should be void; but in default of payment of all or any of the said sums at the times appointed, then it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs forwith to enter upon the premises, and take possession of the goods, furniture, &c., and absolutely sell and dispose of the same. There was a power reserved to the plaintiffs, during the continuance of the deed, to enter upon the premises and take an inventory; and also at any time after default as aforesaid

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'to delay, hinder or defraud creditors' should, only as against creditors, their representatives and assigns, so delayed, etc., be 'clearly and utterly void,' saving always assurances upon good consideration and bona fide of any interest in goods and chattels to any person not having any notice of the fraud." Benjamin, Sales (5th Eng. Ed.) p. 495.

to take and retain possession of the goods until they should deem it expedient to sell. Then followed a proviso, "that until default should be made in payment of all or any of the said sums, it should be lawful for Priest to retain and keep quiet possession of all and singular the said household goods," &c.

Before Priest commenced dealing with the plaintiffs, he had married the widow of one Higman, who formerly kept the Peacock Tavern, and who, at the time of his death, was indebted to Combe, Delafield & Co. in the sum of £1100. His widow being executrix of his will, on her marriage with Priest they both became possessed of Higman's effects; and Priest, by way of security for the said £1100., executed a warrant of attorney to Combe, Delafield & Co., for that amount in November, 1823. On the 1st of November, 1828, Messrs. Combe, Delafield & Co., caused judgment to be entered up on the warrant of attorney, and sued out a writ of fi. fa. directed to the defendants Booth and Copeland, then sheriff of Middlesex, who thereupon issued their warrant to Wilson, the other defendant, their officer, and he seized and took in execution the goods in question, being the furniture and effects in the Peacock Tavern. While the sheriff remained in possession, the plaintiffs came upon the premises, gave the defendants notice of the bill of sale, and required them to relinquish possession, which was refused, and the sheriff sold the goods.

Parke, J. I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J., in Edwards v. Harben, 2 T. R. 587, has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colourable. In Benton v. Thornhill, 2 Marshall, 427, it was said in argument, that want of possession was not only evidence of fraud, but constituted it; but Gibbs, C. J., dissented; and although the vendor there, after executing a bill of sale, was allowed to remain in possession, Gibbs C. J., at the trial, left it to the jury to say, whether under all the circumstances, the bill of sale was fraudulent or not. It is laid down in Sheppard's Touchstone, 224 (7th ed.), "that a bargain and sale may be made of goods and chattels, without any delivery of any part of the things sold;" and, afterwards, in page 227, it is said, "that the word gift is often applied to movable things, as trees, cattle, household stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing;" and in a note to this passage by the editor, it is said, "that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed: also in a donatio mortis causâ, there must be a delivery." Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced to Priest, to enable him to carry on his trade, and his continuance in possession was in terms provided for.[60]

## LANFEAR v. SUMNER.

(Supreme Judicial Court of Massachusetts, 1821. 17 Mass. 110, 9 Am. Dec. 119.)

Trover for the conversion of one hundred chests of young hyson, and fifty chests of hyson tea, averred to be the property of the plaintiff. Trial on the general issue, before the Chief Justice, November term, 1819.

The plaintiff, to prove his property, produced in evidence the following paper: "For value received, I hereby assign and set over to Ambrose Lanfear, and to his assigns, one hundred chests of young hyson tea, and fifty chests of hyson tea, shipped at Canton, by Benjamin C. Wilcocks, on board of the ship Osprey, Capt. Brown, bound to Boston, being my property and consigned to me. Philadelphia, July 2d, 1819. William Waln."

The plaintiff was the agent of the house of Thomas Wilson & Co., merchants in England, to whom the said Waln was indebted in a much larger sum than the value of the teas. By the testimony of the said Waln, and other testimony in the case, it appeared that the above-recited paper was executed and delivered to the plaintiff before two o'clock, P. M. of the said 2d of July. No money was paid by the plaintiff, nor any discharge executed of the debt due to said Wilson & Co., or any part thereof.

The action was defended under the said Sumner, who, as a deputy sheriff of Suffolk, had attached the same teas at the suit of James & Thomas H. Perkins & Co., merchants in Boston, and creditors to Waln to a large amount, upon the bills of exchange drawn upon him and by him accepted. The attachment by the defendant was made on the same second of July, at half an hour past five o'clock in the afternoon; and possession of the teas was taken by him.

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[60] Concurring opinions were delivered by Lord Tenterden, C. J., and Littledale and Patteson, JJ.

For a statement of the law in England at the present time, see Williston, Sales, § 352.

It appeared that the paper aforesaid, purporting to be an assignment of the teas in question to the plaintiff, was by him transmitted to John Dorr, merchant in Boston, as soon as the course of the mail would admit, and was received by Dorr on the 5th of July, who, within an hour after the receipt of the same, made demand of the teas, by virtue of an authority given by the plaintiff on the back of the paper; but he did not obtain possession.

It appeared that the teas arrived at Boston, in the ship Osprey, a day or two before the said 2d of July, consigned by the said Wilcocks to the said J. & T. H. Perkins & Co., on the account and risk, and for the use of the said Waln; and the said Perkins & Co. had entered them in the custom-house, and had given bonds for the duties thereon. An offer was made by Dorr, in behalf of the plaintiff, to indemnify them against their said bonds, and to pay all further charges thereon.

A verdict was taken for the plaintiff by consent, to be set aside if the action could not be maintained on the foregoing facts, and a nonsuit entered; otherwise judgment was to be rendered on the verdict, with additional interest.

Jackson, J. Considering this case in the most favorable view for the plaintiff, it is the case of two creditors, each endeavoring to secure his debt out of the same fund. Neither party had notice of the measures adopted by the other; but each was using his diligence fairly, for the purpose of obtaining payment of a just debt. The question is, Which acquired the best legal title? In this statement of the case, we consider Messrs. Wilson & Co., for whom the plaintiff was agent, as the real plaintiffs, and the Messrs. Perkins & Co., who caused the attachment to be made, as the real defendants.

The conveyance, relied on by the plaintiff, was intended as a payment, to the amount of what the goods should produce; or as security of a debt due from Waln to Wilson & Co.

But it is objected that this consideration of the conveyance does not appear in the instrument; that there was no discharge of the debt; no receipt for the goods, with an obligation to account for the proceeds; and no writing whatever, showing the agreement, which is said to have been made between the parties; but that the instrument purports to be an absolute conveyance by Waln, for a full price received, which must have operated as a fraud upon all the other creditors of Waln.

These objections are certainly entitled to much consideration; but there is another defect in the plaintiff's title, which we think fatal, and that is the want of a delivery to him, in pursuance of the supposed conveyance.

A few hours after this conveyance was made in Philadelphia, the defendant attached the goods in Boston. The attaching creditors are to be considered as purchasers for a valuable consideration, and, in the present case, as purchasers bona fide, and without notice of the prior conveyance to the plaintiff. The defendant took possession under their title; and the plaintiff never acquired possession.

The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession, will hold them against the other. This principle is recognized in the case of Lamb et al. v. Durant, 12 Mass. 54, 7 Am. Dec. 31, and in Caldwell et al. v. Ball, 1 D. & E. 205. The latter indeed was a case, not of actual delivery of goods to either party, but of delivery of the bill of lading. There were two bills of lading, signed at different times by the master of the ship; and the party, who first obtained one of them by a legal title from the owner of the goods, was held to have the best right, although the bill of lading, under which he claimed, was made the last. The endorsement and delivery of the bill of lading, in such a case, is equivalent to the actual delivery of the goods.

This is also the rule of the civil law. When the same thing is sold to two different persons, "Manifesti juris est, cum, cui priori traditum est, in detinendo dominio esse potiorem." Cod. 3, 32, 15. So Voet ad Pand. lib. 6, tit. 1, § 20, "Ad vindicationem rei duobus separatim diverso tempore distractæ, non is cui priori vendita, sed cui (pretio soluto, vel fide de eo habita) prius est tradita, admittendus est." And Pothier, in the place cited in the argument, Vente, No. 318, 320, states the same principle; and puts the case of a sale without delivery, and a subsequent attachment by the creditors of the vendor, who, he says, would hold the goods against such a purchaser.

There are, indeed, in the civil law, various modes of taking or delivering possession; that is, different acts, which are equivalent to actual possession; resembling, in our law, the acknowledgment and registry of a deed conveying land; receiving the keys of the warehouse, in which goods are deposited; and the case before mentioned of receiving the bill of lading of goods at sea. But it is still necessary to every conveyance of goods, that there should be an actual or legal delivery of them to the vendee.

Upon these principles, it is obvious that the defendant must prevail in this case; unless there was a legal delivery to the plaintiff, or something equivalent to an actual delivery, before the attachment made by the defendant. We can see nothing of that kind in the evidence reported. The plaintiff and Waln, it is true, supposed at the time of their negotiation, that the goods were at sea. But if they had been so, Waln had no bill of lading, and no other document or evidence of his title, to deliver to the plaintiff. The case, therefore, does not come within the rule applicable to the endorsement and delivery of a bill of lading; nor can we perceive that it comes within any other exception to the general rule, which requires an actual delivery to the vendee.

Suppose that these goods had been consigned to Waln himself, and that the bill of lading had come to his hands after this negotiation with the plaintiff. If, in that case, a third person had purchased the goods of Waln for a valuable consideration, and without notice of any prior conveyance, and had taken the bill of lading endorsed by Waln, it would not, we think, be doubted that he would hold the goods against the plaintiff. If so, it shows that the property was not absolutely and entirely transferred from Waln to the plaintiff. It might be so, as between themselves; but not with regard to a subsequent bona fide purchaser, for a valuable consideration; and this is the relation in which the defendant now stands.

In the case of Lempriere et al., Assignees of Syeds, a Bankrupt, v. Pasley, 2 D. & E. 485, Syeds before his bankruptcy had covenanted, for a valuable consideration, to assign and deliver to the defendant some goods, which he expected on board a certain ship; and he also covenanted that he would endorse and deliver to the defendant the bill of lading, as soon as he should receive it; and at the same time he did deliver the policy and letters of advice of the expected shipment, which were all the documents he then had. After he became bankrupt, the bill of lading arrived, and he immediately endorsed it to the defendant, who thereupon received the goods. It was decided that the defendant should hold them against the assignees of the bankrupt, on the ground that the assignees stood in the place of the bankrupt, and took his property subject to all equitable liens, to which it was subject in his hands. It was not contended, in the argument for the defendant, that there was a complete transfer of the property, before the bankruptcy; but only an equitable lien or interest in the defendant.

A commission of bankruptcy has been sometimes called a statute execution; but the assignees have not, in all respects under the commission, the same rights as a creditor by execution, or in our law an attaching creditor. Such a creditor, as before observed, is to be considered as a purchaser for a valuable consideration. And in the argument for the defendant, in the case last cited, it was thought material to distinguish between the rights of the assignees, and those which would have been acquired by a creditor under an execution, or a bona fide purchaser under the bill of lading; it being admitted that the latter persons, if they had first got possession, without notice of Pasley's claim, would have held the goods against him. In the opinion of the Court, also, the same distinction is noticed; and it is admitted that such a purchaser, having obtained possession, would hold against Pasley, although the assignees could not. The point decided in that case depended on the English bankrupt laws, and therefore does not affect the question now before us; but the course of reasoning, and the opinions expressed in it, tend strongly to confirm the opinion which we have adopted in the present case.

Plaintiff nonsuit.[61]

## INGALLS v. HERRICK.

(Supreme Judicial Court of Massachusetts, 1871. 108 Mass. 351, 11 Am. Rep. 360.)

Tort against the sheriff of Essex for the conversion of twenty-one bales of flocks of wool, attached on December 17, 1868, by a deputy of the defendant, as property of William H. Lougee, in a suit against Lougee by one of his creditors.

At the trial in the superior court, before Lord, J., the plaintiff introduced evidence which tended to show that on December 16, 1868, he bargained with Louis H. Bosworth, Lougee's duly authorized agent, for a purchase of the flocks at an agreed price; that he bought them to sell again; that the bales were numbered and marked, weighed 7818 pounds, were of about the ordinary size of bales of cotton, and were stored in Lougee's factory; that he told Bosworth that he had no place of his own to store them in, and should wish to have them remain for a while where they were, and would pay storage on them, and Bosworth agreed to this; that he also told Bosworth that he was going to New York the next day, and must have some samples of the flocks to take with him, to resell them by; that on the evening of the same day, at Lougee's counting-room in Lawrence, he received a bill of parcels of the flocks, dated that day and signed by Lougee, specifying the numbers, marks and weights of the bales, and acknowledging receipt of the agreed price, to wit, $360.64 for six bales, weighing 2254 pounds, at 16 cents per pound, and $612.04 for fifteen bales, weighing 5564 pounds, at 11 cents per pound; that at the same time Bosworth gave him parcels of the two kinds of flocks; and that he saw the flocks in the store room at the factory a week or two before December 16, but did not see them on that day, nor afterwards until they had been attached by the defendant's deputy.

Bosworth testified, among other things, "that after the bargain was made he went to the factory and examined the bales to get the number and weight of each bale, and wrote the bill of parcels afterwards signed by Lougee, and delivered it to the plaintiff; that he opened two of the bales and took out small quantities of the flocks, which the plaintiff wanted for samples to sell by, and then sewed up the bales; that he met the plaintiff during the afternoon, and told him that the bill and the samples would be ready for him that evening, at Lougee's counting-room; and that he gave these flocks to the plaintiff at the time of the delivery of the bill of sale."

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[61] See Meade v. Smith, 16 Conn. 346 (1844), in which the doctrine of Lanfear v. Sumner is criticised and rejected.

This was all the evidence of a delivery; and the judge ruled that it would not authorize the jury to find a delivery of the goods as against the attaching creditor of the buyer, and directed a verdict for the defendants. The plaintiff alleged exceptions.

COLT, J. It was ruled as matter of law, in this case, that the jury would not be authorized upon this evidence to find a delivery of the baled flocks, sufficient to pass a title valid as against creditors of the seller.

There was evidence tending to show that the bargain for the sale was made with one Bosworth, an agent of the seller. A receipted bill of parcels, signed by the seller himself, which contained a description of the bales by number, mark and weight, was afterwards delivered by the agent to the plaintiff. The subject matter of the sale was all the baled flocks then stored in the seller's factory. It was thus a completed contract of sale, and as between the parties the title passed to the plaintiff. Was there evidence to go the jury of a delivery sufficient as to creditors? This is the only question, and in disposing of it we must take the sale to have been made in good faith and for a valuable consideration.

Upon this question, there was evidence tending to show that the flocks were bought for resale; that the bales were large, not easily moved, and requiring room for storage; that the plaintiff, having no convenient place, agreed with Bosworth, at the time of the bargain, to let them remain where they were, and pay storage, and directed him to obtain samples of the flocks, which he, the plaintiff, could take with him to New York to sell by; and that Bosworth accordingly opened the bales, took out samples of two kinds of flocks, sewed up the bales, and gave the samples to the plaintiff at the time he delivered the bill of parcels. The plaintiff bought upon his own previous knowledge of the article, having seen the flocks at the storeroom of the factory a week or two before. The samples were not required or used by him in reference to his own purchase, and Bosworth, in taking them from the bales, acted under the directions and as the agent of the plaintiff, and with reference to future sales by him. It was a significant act of ownership and possession on the part of the plaintiff, after the sale was agreed on through Bosworth, acting in this respect as his agent. There is something more, therefore, here disclosed, than a mere contract of sale without delivery or possession under it. And we are of opinion, under the law heretofore laid down by the court, that the case should have been submitted, with proper instructions, to the jury.

It was early held that the possession of personal chattels by the vendor after an alleged sale is not conclusive evidence of fraud. Upon proof that the sale was made in good faith and for a valuable consideration, and that the possession after the sale was in pursuance of some agreement not inconsistent with honesty in the transaction, the vendee might hold against creditors. Brooks v. Powers, 15 Mass. 244, 8 Am. Dec. 99. It was declared by Morton, J., in Shurtleff v. Willard, 19 Pick. 202, 211, that, whatever the rule upon this point may be in England or elsewhere, it is perfectly well settled in a series of cases here, that the possession of the vendor is only evidence of fraud, which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the jury. It is certain that slight evidence of delivery is sufficient; and if the buyer with the consent of the seller obtains possession before any attachment or second sale, the transfer is complete without formal delivery. Shumway v. Rutter, 8 Pick. 443, 19 Am. Dec. 340. A delivery of a portion in token of the whole is a sufficient constructive delivery as against creditors, although the goods are in the possession of various persons. Legg v. Willard, 17 Pick. 140, 28 Am. Dec. 282. In Hardy v. Potter, 10 Gray, 89, the jury were told that, although the plaintiff only took a bill of sale, yet, if prior to the attachment he had been to the place where the lumber was, and had exercised acts of ownership over it, by virtue of his purchase, that would constitute a delivery of it good against a subsequent attachment. And this instruction was held not open to exception, although the evidence was that the purchaser had only been to Beverly and seen the lumber there. See, also, Phelps v. Cutler, 4 Gray, 137; Tuxworth v. Moore, 9 Pick. 347, 20 Am. Dec. 479; Bullard v. Wait, 16 Gray, 55; Ropes v. Lane, 9 Allen, 502, and 11 Allen, 591.

The fact that the possession of the property is retained by the vendor by agreement, and does not follow the bill of sale, is held by this court to be in most of the cases, evidence of fraud, to go to the jury. In many of the states, the fraud is held to be an inference of law resulting inevitably from the possession. And such was supposed to be the earlier English rule, as laid down in Edwards v. Harben, 2 T. R. 587; but the only point there decided was, that an absolute conveyance without possession, if there be nothing but that, is in point of law fraudulent. In the more recent cases, it has been declared that the continued possession by the vendor, of goods sold, is a fact to be considered by the jury, as evidence of fraud, and is not in law a fraud in itself. Martindale v. Booth, 3 B. & Ad. 498. Benjamin on Sales, 363.

There was evidence here of delivery, which should have been submitted to the jury. Exceptions sustained.

## McKIBBIN v. MARTIN.

## SAME v. KLINE.

(Supreme Court of Pennsylvania, 1870. 64 Pa. 352, 3 Am. Rep. 588.)

Before READ, AGNEW, and SHARSWOOD, JJ., THOMPSON, C. J., at Nisi Prius.

The cases, the subject of these writs of error, were two feigned issues under the Sheriffs' Interpleader Act, in both of which Chambers McKibbin was claimant and plaintiff; Thomas J. Martin was the defendant in one issue and Charles D. Kline in the other. The issues depended on the same facts and were tried together January 13th, 1869, before Hare, P. J.

The defendants had respectively recovered judgments against Jeremiah and W. C. McKibbin, who composed the firm of J. & W. C. McKibbin, and had been proprietors and conductors of the Merchants' Hotel, a large hotel in the city of Philadelphia. Executions were issued on the judgments, in September, 1868, under which the furniture, &c., in the hotel were levied upon as their property and claimed by the plaintiff. The issues were to try the ownership of these goods.

The plaintiff gave in evidence the following "Articles of agreement made the 11th day of June, 1868, between Jeremiah McKibbin and William C. McKibbin, copartners as J. & W. C. McKibbin of the one part and Chambers McKibbin of the other. Whereas, on the first day of February, A. D. 1865, the said Chambers McKibbin, being the owner and proprietor at the time, of the lease and good-will of the Merchants' Hotel, situated on the west side of Fourth Street, south of Arch street, in the city of Philadelphia, also of its furniture and fixtures of all kinds, &c., and generally of all its arrangements and appurtenances of every nature for the transaction of the business of hotel-keeping, on the said 1st February, 1865, sold the same to the said J. & W. McKibbin, for the sum of $30,000, of which $5,000 were to be paid in 20 days, and $5,000 in each of five other payments, respectively in 6, 12, 18, 24 and 30 months, with interest for deferred time, from February 1st, 1865, for each of which payments the said J. & W. McKibbin gave to the said Chambers McKibbin their promissory note; and whereas the whole of said purchase-money remains due and unpaid, the parties of the first part having wholly failed to pay any of said notes or any interest thereon; and whereas in the event of default in their payment, it was agreed that upon request of said Chambers McKibbin, said premises should be reconveyed:

"Now, therefore, these presents testify that for and in consideration of the surrender and cancellation of the said promissory notes and of the debt they represent, &c., and in pursuance of the aforesaid agreement and understanding at the time of the original purchase, the said parties of the first part have sold, &c., unto the said party of the second part, the lease of the said the Merchants' Hotel premises, together with the good-will, fixtures and appurtenances of the business now transacted in said hotel, and all and singular the furniture, &c., and generally all things for the transaction of the business of hotel-keeping, to them the parties of the first part belonging, and now to said premises and the business there transacted pertaining."

Jeremiah McKibbin, a son of Chambers and one of the defendants in the executions, testified amongst other things: "Upon sale, the property, in June, 1868, passed into the hands of my father—the property described in bill of sale. The 'Press' advertisement of dissolution—also in 'Age'—are authorized advertisements of the change. From 11th of June, 1868, C. McKibbin carried on the business of the hotel. Have had no interest in business since sale. Father has lived in the hotel since 1865. He has received the income, paid the bills and conducted the business since sale. I and my brother remained as before, and I was superintendent. I have received nothing but compensation for services, at the rate of $3,500 a year, but there was no express bargain. Bills of hotel were made out in name of C. McKibbin as soon as could be printed. Bills are made out every day more or less. The sign 'Merchants' Hotel' in front of hotel. No sign put up of C. McKibbin. My father boarded with me and paid no board. My mother had general charge of house and no board was charged. He assumed general charge of business as soon as sale. No express contract has been made with me. He directed the payment of bills and business generally. He has since sale received proceeds of hotel and paid money out when necessary. Journal was J. & W. C. McKibbin up to sale, and journal of C. McKibbin after sale in same book. I do not reside in hotel. The hotel deals with many people—probably 200—and with all, bills are made in name of father since sale. Boarders to firm, who were indebted, had to pay boarding in full to C. McKibbin."

George Jacoby testified: "I was bookkeeper for two years, to middle December last. We were ordered on 16th of June to open new set of books, and did so in name of C. McKibbin. From that time he conducted the business. 'Merchants' Hotel' is the only sign that was on the hotel for two years; was no sign of J. & W. C. McKibbin. Business was transacted, bills printed and receipted and rendered in name of C. McKibbin. Several were rendered in name of old firm and were sent back for correction. Cash-notes, checks, &c., were signed by C. McKibbin."

The advertisements referred to in the testimony of Jeremiah McKibbin are as follows:

"The copartnership heretofore existing between the subscriber in the business of conducting the Merchants' Hotel of Philadelphia, is

dissolved, they having disposed of their interest therein to Chambers McKibbin.
Jeremiah McKibbin.
"W. C. McKibbin."

"The undersigned has again become owner of the 'Merchants' Hotel,' and will hereafter conduct and continue the business. He invites a continuance of its former patronage. Chambers McKibbin."

The court submitted the question of good faith to the jury, and reserved the following point: "Whether under all the evidence there was such actual, visible, notorious delivery and change of possession from the sons to the father of the furniture as would be valid in law against the creditor of the vendor."

The jury found for the plaintiff. The court afterwards entered judgment for defendant in the feigned issue, on the point reserved.

The plaintiff took out a writ of error in each case, and assigned the entering of judgment for the defendant on the reserved point, for error.

Sharswood, J. There are probably no more difficult and embarrassing questions than those which relate to the respective provinces of the court and of the jury to determine what is law and what is fact. It would require a volume to consider the subject in all its bearings, and deduce accurate and intelligible principles from the great mass of the decided cases, and a philosophical treatise on this important head is still I think a desideratum of our legal literature. There are undoubtedly some rules clearly established—these are plain lines of demarcation, but there is a border land of controversy in which the opposing principles seem to be in continued conflict, the victory sometimes inclining to one side and sometimes to the other. This conflict often has ended in a reasonable compromise by which the question has become what is termed a mixed question of law and fact, to be submitted to the decision of the jury under proper instructions from the court.

One of the questions upon which difficulty has often arisen is fraud in the sale or transfer of chattels under the statute of 13 Eliz. c. 5, Roberts's Dig. 295. Such fraud may be either actual or legal. Actual fraud or fraud in fact consists in the intention to prevent creditors from recovering their just debts by an act which withdraws the property of a debtor from their reach. Fraud in law consists in acts which, though not fraudulently intended, yet as their tendency is to defraud creditors if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal. Baldwin, J., in Hanson v. Eustace, 2 How. 688, 11 L. Ed. 416. Actual fraud is always a question for the jury—legal fraud, where the facts are undisputed or are ascertained, is for the court. Dornick v. Reichenback, 10 Serg. & R.

90. "As remarked by an eloquent writer," says Chief Justice Gibson, "these statutes of Elizabeth produce the most beneficial effects by placing parties under a disability to commit fraud in requiring for the characteristics of an honest act such circumstances as none but an honest intention can assume; and they seem to have been expressed in general terms purposely to leave room for a large interpretation by the judges, who, in accordance with the spirit rather than the words, have engrafted on them such artificial presumptions and legal intendments as are ordinarily subjects of judicial construction. In fact they act exclusively by presumptions, not always inflexible indeed, but sometimes amounting to legal conclusions." Avery v. Street, 6 Watts, 247.

In Twyne's Case, which came up in the Star Chamber in 44 Eliz., and is reported 3 Rep. 80b, Moore 638, one of the badges of fraud was declared to be that "the donor continued in possession, and used the goods sold or given as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them." No distinction was attempted between actual and legal fraud, and the tribunal forbade any question as to law and fact. It is unnecessary to trace the decisions in England. Clow v. Woods, 5 Serg. & R. 275, 9 Am. Dec. 346, decided by this court in 1819, is the Magna Charta of our law upon this subject. The principles settled in that case have been recognized and affirmed by a beadroll of subsequent decisions, which it would be a mere affectation of learning to cite. Without adverting to other points, it established that retention of possession was fraud in law wherever the subject of the transfer was capable of delivery and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. Since then the courts have been principally occupied in determining when the evidence of change of possession was such as to present a question of law for the court or of fact for the jury.

No point as to actual fraud arises on this record. That was submitted to the jury, and decided by them in favor of the plaintiff. The whole question of legal fraud, however, was reserved and judgment entered on the reservation for the defendant. If there was evidence from which a jury would have been justified in inferring, under instructions from the court, that there had been in point of fact an actual and exclusive change of possession, it ought, as we think, to have been submitted to them.

The reserved point comprehends two questions, which, in the consideration of the case, it will be best to keep distinct. First: was there evidence from which the jury would be permitted to find such a delivery, actual or constructive, as the law requires to make the sale valid as against creditors? Second: was the possession taken by the vendee exclusive of the vendors or concurrent with them, in point of law?

1. Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. The court is the tribunal to judge whether there is sufficient evidence to justify the inference of such a delivery. If there is any question upon the evidence as to the facts, or resting upon the credibility of witnesses, the determination of that must be referred of course to the jury. But if not, it is incumbent upon the court to decide it, either by a judgment of nonsuit or a binding direction in the charge. Young v. McClure, 2 Watts & S. 147; McBride v. McClelland, 6 Watts & S. 94; Milne v. Henry, 40 Pa. 352; Dewart v. Clement, 48 Pa. 413. But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer. Clow v. Woods, 5 Serg. & R. 275, 9 Am. Dec. 346; Cadbury v. Nolen, 5 Pa. 320; Linton v. Butz, 7 Pa. 89, 47 Am. Dec. 501; Haynes v. Hunsicker, 26 Pa. 58; Chase v. Ralston, 30 Pa. 539; Barr v. Reitz, 53 Pa. 256; Benford v. Schell, 55 Pa. 393.

In such cases it is only necessary that the vendee should assume the control of the subject so as reasonably to indicate to all concerned the fact of the change of ownership. Where nothing of the kind has taken place, it is the duty of the court to pronounce a mere symbolical delivery to be insufficient; but where there is evidence of such assumption of control, it is for the jury to say whether it was bona fide or merely colorable, and whether it was enough to give notice to the world. The question in such case is, did the vendee do all that he might reasonably be expected to do in the case of a real and honest sale? In Barr v. Reitz, 53 Pa. 256, the rule was clearly expressed in the opinion of the court by Mr. Justice Agnew. "In considering the question what is an actual delivery, the nature of the property and circumstances attending the sale must be taken into the account. We are not, in carrying out a mere rule of policy, to confound all distinctions between that which is capable of easy delivery and that which is not. Squared timber lying in the woods, or piles of boards in a yard, are incapable of the same treatment as a piece of a cloth, or a horse. So there are many cases which allow the force of those circumstances, which take away any false color or appearance of ownership remaining in the seller." Then, after citing a number of decisions, it is added: "But without affirming these doctrines to the extent these cases might seem to warrant, it is sufficient to say they are illustrations of the principle we have stated that the circumstances may prevent the court from pronouncing it a fraud, per se, and carry the case to the jury on the facts with proper instruction from the court on the law, if the jury find the delivery of possession merely formal or constructive."

The distinction founded upon the principle here stated between a question of law and one of fact, may be illustrated by a familiar example. Upon the sale of a single board, or of a cartload of boards, it would not do to set up a constructive delivery by marking, and letting it remain where it was until it was convenient to remove it. The court would be bound to hold as matter of law, that such articles were capable of actual delivery. But it would be different with a board-yard, filled with many piles of lumber. There the circumstances are such as to render an actual delivery and removal impracticable, or at least injurious and expensive. The vendee must assume the control, and do all that an honest man would reasonably be expected to do to advertise the public of the sale.

This seems to be just the difference between the case of Steelwagon v. Jeffries, 44 Pa. 407, upon which the court below relied, and the evidence as it appears on this record. That was the sale of the furniture of a dwelling-house. Nothing is easier than to remove it to another house, or if that be not necessary, for the vendor to leave the house and the vendee to take possession with all the ordinary indicia of ownership. That is the ground upon which the present Chief Justice placed that determination. "Why," says he, "is not the transfer of household property to be actual and exclusive like that of any other personal property? It is as capable of manual occupancy and removal as almost any other kind. If the sale be actual it usually is removed; if it be only for the purpose of securing it against creditors, why shall it not stand on the same platform with other property, capable of delivery and change of possession?" But the circumstances of a large establishment like the "Merchants' Hotel" are entirely different. Here are many hundred lodging rooms, parlours and sitting-rooms, besides the culinary department with its necessary offices, all fully furnished. To what other building can the vendee remove them, or least without great deterioration and expense? They are valuable mainly for the purpose for which they are used and in the place where they are situated. It is enough that the vendee assume the direction and control of them, and in such an open, notorious manner as usually accompanies an honest transaction. Whether all was done that ought to have been done in this instance, and whether the change of possession was real and bona fide—not merely colorable and deceptive—leaving the actual possession and control in the vendors, were questions of fact which ought to have been submitted to the jury.

2. But the law undoubtedly is, that not only must possession be taken by the vendee, but that possession must be exclusive of the vendor. A concurrent possession will not do. "There cannot in such

case," said Mr. Justice Duncan, "be a concurrent possession; it must be exclusive, or it would by the policy of the law be deemed colorable." Clow v. Woods, 5 Serg. & R. 287, 9 Am. Dec. 346. And again, in Babb v. Clemson, 10 Serg. & R. 428, 13 Am. Dec. 684; "There cannot be a concurrent possession in the assignor and assignees; it must be exclusive, or it is deemed colorable and fraudulent. To defeat the execution, there must have been a bona fide substantial change of possession. It is mere mockery to put in another person to keep possession jointly with the former owner. A concurrent possession with the assignor is colorable." But what is the concurrent possession which will be deemed such as matter of law? Evidently as owner, or accompanied with the ordinary indicia of ownership—such as will lead any person not in the secret to infer that there has been no actual change. The vendor must appear to occupy the same relation to the property as he did before. In such a case the court must pronounce it fraudulent and colorable per se. We have been referred to three cases only in our books which were determined on this ground. These were all of the character I have stated. Hoffner v. Clark, 5 Whart. 545; Brawn v. Keller, 43 Pa. 104, 82 Am. Dec. 554; Steelwagon v. Jeffries, 44 Pa. 407. Certainly it may be considered as settled by abundant authority in this court that where there has been a sufficient actual or constructive delivery to the vendee, and he is in possession, the fact that the vendor is employed as a clerk or a servant about the establishment, in a capacity which holds out no indicium of ownership, does not constitute such a concurrent possession as the law condemns. In such cases it is a question for the jury whether the change of possession has been actual and bona fide—not pretended, deceptive and collusive. If there are facts tending to show that he had a beneficial interest in the business; that the proceeds of it went to him beyond a reasonable compensation for his services; that he had an unlimited power to draw upon the till; or that with the knowledge of the vendee he took money to pay his own debts—these are facts for the jury.

I will refer to a few of the cases which sustain this view. Thus in McVicker v. May, 3 Pa. 224, 45 Am. Dec. 637, a sale by a father to a son; when the son had removed to another tavern-stand the father continued to live with him, and was employed about the house as a servant. "When the son opened the new tavern," say the court, "his mother and sister kept house for him, and his father did jobs; but the son's possession and use of the goods were exclusive. But if mere cohabitation were a badge of fraud, a father's sale to his unmarried son would seldom be sustained. It certainly was not necessary for the son to turn his father out of doors." Forsyth v. Matthews, 14 Pa. 100, 53 Am. Dec. 522, as explained by Mr. Justice Lowrie, before whom the case had been tried below. Dunlap v. Bournonville, 26 Pa. 74, was a sale by a son to his father, and though the business continued to be conducted in the same place and with the assistance of the son, yet there being evidence of an actual transfer of the possession and control of the property, the sale was sustained. Childs v. Simmons, an unreported case, cited 26 Pa. 74; the transfer was by a storekeeper to his clerk, the vendor continued to aid in the store, but the sign was changed, and the sale was upheld. Hugus v. Robinson, 12 Harris, 9. The subject was a drugstore. The vendee bought it for his son, who had been a clerk and apprentice of the vendor, and put him in possession. The vendor attended the store very much as before, and the signs were not changed. It was left as a question of fact, to the jury, and the judgment was affirmed. In Dunlap v. Bournonville, 26 Pa. 72, two brothers transferred a coachmaker's establishment to a third, and the vendors remained in the capacity of foremen. It was held that it ought to have been submitted to the jury. Chief Justice Thompson has said that this case stands on the very outer verge of settled principles, but on its facts is still within them: 44 Pa. 412. In Billingsley v. White, 59 Pa. 464, two partners sold out a store of goods to the brother of one of them. One of the vendors continued in the store as a hired hand. "If," said Mr. Justice Williams, "Billingsley's acts and declarations as a salesman had been such as to leave it doubtful whether he was acting as owner or agent, then his presence and connection with the goods would have been such evidence of retained possession as to render the sale fraudulent. But if his acts and declarations were professedly and apparently those of a mere agent, and were so understood by the parties with whom he dealt, as all the evidence tends to show, then they constituted no such badge of fraud or evidence of retained possession as would justify the court in declaring the sale fraudulent."

I frankly confess that I have not regarded this line of decisions with favor. Dunlap v. Bournonville was tried before me in the District Court, and I entered the judgment of nonsuit, which was there reversed. I dissented from the determination in Billingsley v. White, because I was afraid that it went a step further than any of the preceding cases in recognizing the right of the vendee to employ the vendor as his agent to conduct the business. Perhaps it does not go that far. But I have been too long on the bench—now nearly twenty-five years—not to have learned this lesson, that a judge has no right to adhere to his own favorite opinions, after they have been reversed or overruled. It is his duty to administer justice according to the law as it is settled—not according to his own notions of what it ought to be. "Neminem oportet esse sapientiorem legibus;" no man out of his own private reason ought to be wiser than the law, which is the perfection of reason, says Lord Coke: 1 Inst. 97, b.

Judgment reversed, and venire facias de novo awarded.

## STIMSON et al. v. WRIGLEY.

(Court of Appeals of New York, 1881. 86 N. Y. 332.)

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, entered upon an order made April 8, 1880, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from selling, as constable of the city of Cohoes, certain machinery levied upon by him, under and by virtue of certain tax and assessment warrants issued to him by the chamberlain of said city.

The property in question originally belonged to the Clifton Company, a manufacturing corporation, against which corporation taxes were assessed as appeared by the rolls attached to said warrants. The warrants were issued to the chamberlain, one in August, one in December, 1875, and one in February, 1876. They were placed in the hands of defendant for collection between the 10th and 20th days of May, 1876. On the 22d day of December, 1875, the property in question was sold by the sheriff under and by virtue of executions issued to him upon judgments rendered in favor of the plaintiffs against said corporation, and was bid in by the plaintiffs.

The court found that the sale "was not accompanied by an immediate or other delivery, nor was it followed by any actual or other change of possession at least until after February 24, 1876, and after the issue of the warrants to the chamberlain, * * * and that no proof has been given, showing that said sale was made in good faith, and without any intent to defraud the creditors of the said Clifton Company;" and, as conclusions of law, that the sale to the plaintiff was fraudulent and void as against the creditors of said corporation, and that the city of Cohoes was a creditor within the meaning of the statute of frauds.

Further facts appear in the opinion.

FINCH, J. It is found as a fact, upon evidence which is, at least, sufficient on appeal, that the sale to the plaintiffs was not accompanied by an immediate or other delivery of the property sold, nor followed by any actual or continued change in possession, until after the issue of the tax warrants of the city of Cohoes to its chamberlain. If therefore the provisions of the statute of frauds apply (3 R. S. [5th Ed.] 222, §§ 5 and 6), and the city at the issue of the tax warrants to the chamberlain was a creditor of the corporation within the meaning of the statute, the presumption of fraud arose which was found as a legal conclusion by the trial court, and sustained by the General Term. That the statute applies to a sale on execution as against the purchaser, and whether that purchaser be the plaintiff in the execution, or a third person, was early decided. Fonda v. Gross, 15 Wend. 628; Gardenier v. Tubbs, 21 Wend. 169.

The reason of the rule and the evil at which it was aimed justify these decisions. To permit a continued possession in the vendor encourages transfers of mere title to defeat creditors, while the debtor's beneficial use of the property leaves him practically the owner, and tends to give him a credit to which he is not entitled. As an honest purchaser buys because he wants the property and its possession, and therefore naturally and usually takes it, the absence of this fact indicates some purpose different from that of an honest purchaser and requires proof of good faith and honest intention. These considerations apply equally to cases where the transfer of title from the vendor is through the agency of a judgment and execution followed by a sheriff's sale. In this case the judgment creditors were also purchasers. A delivery and change of possession upon the sale was possible by the act of the judgment debtor and the vendee. The case is not like that of Mumper v. Rushmore, 79 N. Y. 19, to which we are referred. There neither vendor nor vendee possessed or controlled the property at the time of the assignment. The possession of the sheriff under a hostile levy made delivery and change of possession impossible to assignor and assignee, and so relieved them of the duty and adequately excused its non-performance.

The argument of the appellant is not aimed at a contradiction of these views, but seeks to establish that there was a change of possession in fact, and if not, that enough was shown to repel the presumption of fraud. The question of fact is not without difficulty. There was some contradiction in the testimony, or at least in the inferences to which it led, and where that is the case, the conclusions of the trial court upon the facts are not open to our review. The circumstances of the case however impress us with the idea that there was merely a change of title of the machinery from the failing corporation to certain of its individual members, or their relatives, brought about by judgments obtained on default, without any change whatever of the possession of the property, at least until February, 1876, when S. Edward Stimson became lessee. Prior to that time nothing appears to have been done which owed its origin to the change of title, and nothing afterward, outside of the formal lease. The case was therefore one which demanded explanation and evidence of good faith, or certainly justified the inference of the Special Term from which such need of explanation follows.

It is argued that the judgments prove good faith. That they are conclusive between the parties is true, but third persons may assail them for fraud in proper cases; and the statute, with its presumptions founded upon non-delivery and absence of changed possession, draws no distinction between modes of transfer. In a case like the present it is the judgment, execution and sale by the sheriff which constitutes together the conveyance by which title is transferred; and to say that such transfer because of its form and character, proves good faith as against an assailing creditor, is to except from the operation of the statute one mode of conveyance, although the rule relates equally to all and makes no exceptions. The cases cited by the appellant on this point (Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294, and Hall v. Stryker, 27 N. Y. 596) in no respect contravene this doctrine.

It is said that the immediate removal of the property sold was excused because it was heavy machinery screwed to the floor of the mill and not easily handled.

Undoubtedly the bulky and cumbersome character of articles sold affects the nature of acts of delivery and taking possession. But some act, definite and distinct, is always required. Actual removal from the mill might not have been necessary, but something tantamount to an actual delivery, some plain surrender of possession on the one hand and assumption of it on the other, is necessary, and the finding of the Special Term negatives the existence of any such fact.

It follows that the presumption of fraud attached to this transfer as against the claim for taxes of the city of Cohoes, if the latter was a creditor as defined in section 6 of the statute. That the city was a creditor when the tax warrants were delivered to the chamberlain scarcely admits of doubt. The taxes at that date were fixed and ascertained and due in specific amounts from the corporation to the city. All the tax warrants were delivered to the chamberlain before the plaintiffs' title accrued by the sheriff's sale, except that for the Mohawk street sewer, which reached the chamberlain after the sale, but before the 24th of February, 1876, when the premises were leased to S. Edward Stimson.

The statute defines what creditors are within the protection of the act. They are "all persons who shall be creditors of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession, or under his control." The city of Cohoes was such creditor during the whole period subsequent to the sale, and was within the protection of the act. Assuming that the lease to S. Edward Stimson, made after the issue of the tax warrants to the chamberlain, and the acts done under it, amounted to a delivery and change of possession within the meaning of the statute, which we do not decide, the question is still left whether such after-delivery destroys the effect of the previous omission, and validates the sale as against the process issued later to the constable. Certainly such after-delivery does not explain or excuse the previous omission. That still remains as a fact from which the inference of fraud arises.

The language of the statute, so far from permitting or excusing such after-delivery, seems expressly framed to forbid it any effect as against previously existing creditors. It requires the sale to be "accompanied" by an "immediate" delivery. Against one postponed it aims the presumption of fraud. The delay, the omission, whether brief or long, is the very thing which raises the presumption. Nor does it matter that the creditor is not armed with process and a specific lien until after the delivery. Before that he is a creditor, entitled to the benefit of the statute, which gives him that benefit as such, and without reference to his process. While he cannot utilize the benefit without the aid of process and a specific lien, yet when he comes with it in his hand, he may avail himself of the presumption which the statute gives him as a creditor while the goods sold remained in the vendor's possession. The opinions of Judge Learned at Special Term and in Dutcher v. Swartwood, 15 Hun, 34, on this point are well and accurately reasoned and meet our approval.

A further point was urged on the argument that the tax warrants were issued illegally and without authority. But the plaintiffs in their complaint expressly waived such objection. The defendant had the right to rely upon that waiver, and must be presumed to have tried his case on such reliance. He could not be expected to prepare for an issue which was withdrawn from the case by the pleadings.

These views render unnecessary a consideration of the further questions whether the remedy by injunction was applicable.

The judgment should be affirmed, with costs. All concur.

Judgment affirmed.[62]

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## TILSON v. TERWILLIGER et al.

(Court of Appeals of New York, 1874. 56 N. Y. 273.)

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department, affirming a judgment in favor of plaintiff entered upon a verdict.

This was an action to recover damages for the alleged conversion of a mare alleged to have been purchased by plaintiff of one Isaac J. Craig.

Defendants justified under a judgment and execution in favor of defendant Atkins, which execution was placed in the hands of defendant Terwilliger, as constable, who, by virtue thereof, levied on the mare then in the actual possession of Craig.

Plaintiff testified that he bought the mare of Craig in 1865, paying full consideration therefor; that she was delivered to him, and that he had actual possession for about a year; that she was kept for him

[62] In Myers v. Harvey, 2 Pen. & W. (Pa.) 478, 23 Am. Dec. 60 (1831), Gibson, C. J. said: "Retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, because the sale is not the act of the person retaining, but of the law, and because a judicial sale, being conducted by the sworn officer of the court, shall be deemed fair, till it is proved to be otherwise." And in Lothrop v. Wightman, 41 Pa. 297 (1861), Woodward, J., said that "the judicial sale was legal notice to all the world of the change of property, and needed no correspondent change of possession and of the indicia of ownership to complete its effect."

by a third person for above a year, and that, in 1867, he returned her again to the possession of Craig, as he testified, to be kept for him.

Upon the trial defendants made various offers to prove declarations of Craig, after the mare was returned to his possession, as to his title, and as to his intent in disposing of her. These were excluded under objection, and defendants excepted. Defendants asked to go to the jury on the question of fraud, but the court declined to submit any question to the jury, save that of damages, to which defendants excepted.

FOLGER, J.[63] There was not a continued change of possession of the thing sold. It was found after the sale, with no intermediate change of title, in the possession of the vendor, by the act of the vendee.

It is true, the sale was accompanied by immediate delivery to the vendee, and an actual change of possession; and much time then passed before the chattel came again into the possession of the vendor. This matters not, save as a circumstance to be considered by the jury, on the issue of good faith and absence of intent to defraud. The change of possession into the vendee did not continue. With no other title in the meantime claimed to it than that of the vendee, it had come with his knowledge and assent into the open and notorious control and possession of the vendor. The law will not measure the lapse of time from the sale and delivery, to this renewed possession by the vendor directly from his vendee, and say that a change of possession continued for this longer period, will satisfy the statute; but for that shorter period will not. The statute is imperative that the sale must be followed by a continued change of possession, or it shall be presumed to be fraudulent. It is then upon the vendee to make it appear that the transaction was in good faith, and with no intent to defraud.

This is a question for the jury. And whatever other rules of law there may be, in our judgment it should in this case have been submitted to them. Here was a presumption in favor of the defendants, growing out of the possession found in the vendor. Against this was the testimony of the vendee alone. His credibility in such position was in issue. We do not think that when there is on one side the presumption against the legality of the transaction which the statute makes; and on the other, the vendee seeking by his own oral testimony alone to repel that presumption, that the matter may be taken from the jury and passed upon by the court as a question of law.

For this reason the judgment must be reversed, and a new trial ordered.[64] * * *

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[63] Part of the opinion is omitted.

[64] In Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500 (1860), the court, in construing a statute which enacted that "Every sale, * * * unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, * * * shall be conclusive evidence of fraud, * * *" said: "The 'continued change of possession,'

## WEEKS v. FOWLER.

(Supreme Court of New Hampshire, 1902. 71 N. H. 518, 53 Atl. 543.)

Trover, for store fixtures. The defendant is trustee in bankruptcy of the estate of John P. Clay & Son. Trial at the March term, 1902, of the superior court, before Young, J.

The plaintiff bought the fixtures of the Clays, March 15, 1900, and gave them credit for the price upon an existing debt. The Clays were to have the possession and use of the fixtures until the plaintiff was ready to take them away. About August 18, 1900, the plaintiff discovered that the Clays were insolvent; and on that day he and two other creditors, in good faith, purchased the Clays' stock in trade, consisting of provisions, at an appraisal, for the purpose of securing as much as possible of their indebtedness to the purchasers. The plaintiff took possession of the stock for the benefit of the purchasers, and of the fixtures for his own benefit, and retained it until it was taken from him by the defendant, if possession and retention thereof can be found from the following facts:

An inventory of the stock was taken, and the goods and fixtures were turned over to the plaintiff, who took possession of, and locked, the building in which they were kept. The store was closed from August 18 to August 21, and was opened on the latter day for a special sale of the goods. The plaintiff employed one of the Clays and one of their employees to assist him in selling out the stock. The Clays' sign was not removed from the windows, nor from the bulletin board on which the special sale was advertised. The plaintiff was in and out of the store while it was open, in charge of the business. The goods and fixtures were attached as the property of the Clays, at a time when the plaintiff was absent from the store, and subsequently went into the possession of the defendant.

Upon these facts the court found for the plaintiff, and the defendant excepted.

Chase, J. This action, being trover, is within the jurisdiction of the state courts. Truda v. Osgood, 71 N. H. 185, 51 Atl. 633.

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then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrines of the Courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee."

The principal question raised by the exception is whether the sale of the fixtures to the plaintiff was valid as against Clay & Son's attaching creditors. By the agreement of sale, Clay & Son were to have the possession and use of the fixtures until the plaintiff got ready to take them away, and Clay & Son in fact had such possession and use for a period of more than five months subsequent to the date of the sale. No explanation of these facts was given. If nothing further appeared, relating to the possession, these facts would establish the existence of a secret trust in favor of the vendors, and would render the sale fraudulent in law, and void as against attaching creditors. Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375.

But it further appears that on August 18 the plaintiff took possession of the fixtures, together with the stock of goods purchased by him and other creditors of Clay & Son on that day, and that he retained the possession until it was taken from him by the defendant, if possession and retention thereof can be found from the facts reported. No attempt was made by creditors or by the defendant to avoid the sale until August 21st or later. If, prior to such attempt, the plaintiff received actual, open, visible possession of the fixtures, and subsequently retained it, the secret trust would terminate, and the sale would be purged of its fraudulent character. It is only to prevent creditors from being deceived by false appearances, and consequently defrauded, that the law infers the existence of a secret trust in favor of the vendor when he retains possession of chattels after a sale, and offers no explanation for the inconsistency of his acts. When the false appearances cease, creditors no longer require the benefit of the rule to protect their rights. They then have notice of the vendee's claim to the property, and must govern themselves accordingly. Albee v. Webster, 16 N. H. 362, 370; Smyth v. Carlisle, 17 N. H. 417; Mandigo v. Healey, 69 N. H. 94, 45 Atl. 318; Kendall v. Samson, 12 Vt. 515; Ward v. Camp, 67 Vt. 461, 32 Atl. 236; Gilbert v. Decker, 53 Conn. 401, 4 Atl. 685.

The question, then, arises whether the facts reported are sufficient to show such a change of possession on August 18th and subsequently as the law requires to render the sale valid. If they are sufficient as matter of law, or if they are sufficient to justify the finding of such change as matter of fact, the sale must be upheld as against the defendant. The only facts tending to show that the change of possession was not actual, open, visible, notorious—all that was possible—are the employment of one of the vendors and one of their servants to assist in selling the goods, and the allowance of the vendors' signs to remain in the positions they occupied before the sale. Aside from these facts, it appears that the goods and fixtures were turned over to the plaintiff, presumably by Clay & Son; that an inventory of the goods was taken; that the plaintiff had possession of the building in which the property was located; that the store was closed between August 18th and August 21st; that a special closing-out sale of the goods was then begun; and that the plaintiff was in and out of the store, in charge of the business, while the sale was in progress. Not only were the formalities usually attending a sale of such property complied with, but they were followed by unmistakable and notorious acts of ownership on the part of the vendees. The most that can be said concerning the facts first mentioned is that they have a tendency to conflict with the latter facts in respect to the change of possession. They do not necessarily show that the vendors still retained possession in whole or in part. Whatever possession one of them and the former servant had while assisting in selling the goods was the possession of the plaintiff. They were his servants. Their true relations to him and the goods would be likely to appear from the presence of the plaintiff and his control of the business, the unusual nature of the sale, the absence of one of the vendors, and other circumstances surrounding their acts. The failure to remove the signs was competent evidence tending to prove that there had been no change of possession, but it was not conclusive. It might be explained, and its tendency be repelled, by other evidence throwing light upon the transaction. Seavy v. Dearborn, 19 N. H. 351, 356. Nor do these facts introduce into the question of possession elements of such doubtful nature (the true character of which it is so difficult to prove) that the law, in the exercise of a wise policy, ought to lay hold of them, and, presuming that they have a tendency to prove a retention of possession by the vendors, decide the question upon a consideration of them and such presumption, entirely ignoring all other facts. When they are considered in the light of the surrounding circumstances, their true character is almost certain to appear.

Two cases are relied upon by the defendant to sustain the proposition that the facts reported show, as matter of law, that the change of possession was insufficient,—Sanborn v. Putnam, 61 N. H. 506, and Harrington v. Blanchard, 70 N. H. 597, 49 Atl. 576. Although there is much similarity between these cases and the present case, there are differences, which, though small, are very material, and distinguish the cases from this one. In both of the cases the business was carried on after the sale the same as before, while in this case a significant change was made,—a closing-out sale was begun. This change was likely to attract attention, especially as the business was that of selling provisions. In Sanborn v. Putnam the vendee was employed in the business prior to the sale, and it was found as a fact that there was no visible change in the possession of the property; while in this case the plaintiff, so far as appears, had no connection with the business before he became a purchaser, with others, of the stock of goods. Whatever possession the plaintiff then received and subsequently retained was entirely new. In Harrington v. Blanchard there was no manual delivery of the stock, while in this case the goods and fixtures were turned over to the vendee, and he took charge of the business, and was in and out of the store.

Upon the facts reported, it cannot be held as a matter of law that there was not sufficient change of possession on August 18th and subsequently to render the sale valid as against the vendors' creditors, nor that there was not sufficient evidence to support the finding of possession as a matter of fact.

This conclusion renders it unnecessary to consider the question whether the defendant, being a trustee in bankruptcy of the estate of Clay & Son, instead of an attaching or judgment creditor, could avail himself of the rule of law laid down in Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375, and like cases, to avoid the sale if the change of possession were insufficient. Thompson v. Esty, 69 N. H. 55, 45 Atl. 566; In re Mullen (D. C.) 101 Fed. 413; Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451).

Exception overruled. All concurred.

## PIERCE v. CHIPMAN.

(Supreme Court of Vermont, 1836. 8 Vt. 334.)

This was an action of trespass, for taking a certain heifer, brought by appeal to the county court. Plea, the general issue, to the court.

On the trial the following facts appeared. Artemas M. Pierce was the owner of this heifer. On the first of January 1835, he put her to one Aldrich, to be kept and fed out the winter and until grass. On the first day of April, he and the plaintiff conferred on a purchase of the heifer, and on the eleventh the contract was concluded, and the plaintiff gave his note for twelve dollars for her. The said Artemas wrote and sent by his son to Aldrich the following note:

"Mr. Aldrich, I have sold my heifer to Dexter Pierce. I will however pay you for wintering her out, as that is our bargain.

"Respectfully yours, A. M. Pierce."

Which was delivered to Aldrich by the boy, and the plaintiff called on Aldrich and went with him to the barn to look at the heifer saying, he had bought her. Eight days after this, the defendant, a deputy sheriff, called at Aldrich's, with a writ of attachment against said Artemas M. Pierce and took away said heifer thereon. In the course of the trial the defendant offered in evidence, a copy of said writ, which was objected to by the plaintiff on the ground that the same was not admissible on the general issue; but the same was admitted. The court decided, that there was a sufficient change of possession, of said heifer, and rendered judgment for the plaintiff. To which the defendant excepted.

COLLAMER, J.[65] * * * The question entirely relates to the possession of this heifer, and whether that possession passed to the plaintiff on sale, so as to vest in him a title as against the creditors of the vendor. It is well settled law in this state, that possession must accompany and follow the sale of personal property, in order to vest the same as against the attaching creditors or bona fide purchasers of the vendor, or, in other words, that the actual possession and beneficial use of the property, by the vendor after sale, is inconsistent with the sale, and conclusive evidence against it, so far as relates to third persons, more especially attaching creditors. To this, a sheriff's sale, made by legal authority, is an exception. Still what constitutes this change of possession must be a question which will vary with circumstances. In the case Barney v. Brown, 2 Vt. 374, 19 Am. Dec. 720, and in Spaulding v. Austin, 2 Vt. 555, it was holden that if the property when sold was in the hands of a third person, and he undertook to be the keeper for the purchaser, it was sufficient, though no visible change took place. In Judd & Harris v. Langdon, 5 Vt. 231, where the keeper had never been informed by the purchaser, and in Moore v. Kelley, 5 Vt. 34, 26 Am. Dec. 283, where he had not been informed by either party, and the possession remained with the keeper after sale, it was holden that no sufficient change of possession took place. A middle case is now presented. Here the heifer was in the keeping of Aldrich on a previous contract to keep out the winter, and upon the sale he was fully informed thereof, by both parties. This constitutes a new case, and is to be decided by analogy and the application of general principles.

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[65] Part of the opinion is omitted.

Possession is a strong indication of ownership of property, which the law constantly recognizes and regards. This, especially in relation to personal property, is simple, visible and easily understood; and should as far as practicable be made the test of property; and if this be carried back and connected with actual previous ownership we regard it as conclusive for third persons.

When the actual possession of property is in another at the time of sale, such sale is not accompanied with any implied warranty of ownership in the vendor as on ordinary sales. This is on the ground that the purchaser is put on his inquiry, and that on such inquiry he has been informed to his satisfaction, or could require a warranty in fact. If real estate be in the possession of a third person, the purchaser will be presumed to have notice of any unrecorded deed he may have thereto, from the grantor. This is on the same ground, that is, that he is put on inquiry and ascertained the fact. When the bailee of personal property is fully informed of the sale thereof, both by the vendor and the vendee, he becomes keeper for the true owner by operation of law, and his consent is immaterial; and if the vendor has no further use or beneficial interest in the property, nothing transpires inconsistent with the sale.

In the case of Harman et al. v. Anderson et al., 2 Camp. R. 243, where a question arose as to change of possession in relation to stoppage in transitu, where an actual possession has always been holden necessary to prevent the stoppage. In that case the property was in the possession of a wharfinger to whom notice of the sale was given by a delivery of the sale note, but he made no transfer in his books, nor accepted the delivery of said note or entered into any undertaking with the purchaser. In that case Lord Ellenborough says: "After the note was delivered to the wharfinger, they were bound to hold the goods on account of the purchaser. The delivery note was sufficient without any actual transfer in their books. From thenceforth they became the agents of the vendee." In such case in consistency with general principles, all purchasers and attaching creditors are put upon their inquiry and may arrive at truth; and all danger of fraud be counteracted, so far as possession and use are concerned, though no visible change has transpired.

It is on this ground the cases of Barney v. Brown and Spaulding v. Austin are decided. There no external, visible change of possession took place on sale, of which third persons could take notice; nor did the fact that the bailees undertook to keep for the vendees, render the change any more obvious. But the property was in a third person's possession, which would put all creditors and purchasers on inquiry and result in full notice. But if the property is in the possession of a third person under such circumstances, that on inquiry from him the sale would not be learned, then this security entirely fails. Therefore, if the keeper be not informed of the sale, as in the case Moore v. Kelley, or if he be only informed by the vendor who may have given him a wrong account from sinister motive, and whose ex parte account was entitled to no credit, as in the case of Judd et al. v. Langdon, then the security of notice which the law requires entirely fails, and the possession cannot be considered so changed as to be regarded by creditors. In this case the property was in the possession of a bailee, and this puts all concerned on inquiry. He was fully informed of the sale both by the vendor and vendee and so became keeper for the vendee. Thus the possession was changed with the sale, and creditors and purchasers were furnished with legal means of knowledge, whether the bailee entered into any express undertaking with the vendee or not.

Judgment affirmed.[66]

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[66] For a statement of the law in the several states as to delivery to the buyer and retention of possession by the seller, see Williston, Sales, §§ 353–404.

# SECTION 12.—EFFECT OF FRAUD ON THE SELLER

## CUNDY et al. v. LINDSAY et al.

(House of Lords, 1878. L. R. 3 App. Cas. 459.)

Appeal from a decision of the Court of Appeal, which had reversed a previous decision of the Queen's Bench.

In 1873, one Alfred Blenkarn hired a room at a corner house in Wood Street, Cheapside—it had two side windows opening into Wood Street, but though the entrance was from Little Love Lane it was by him constantly described as 37, Wood Street, Cheapside. His agreement for this room was signed "Alfred Blenkarn." The now Respondents, Messrs. Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to the Plaintiffs on the subject of a purchase from them of goods of their manufacture—chiefly cambric handkerchiefs. His letters were written as from "37, Wood Street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood Street on one side, could only be reached from the entrance in 5, Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son, carrying on business in Wood Street—but at number 123, Wood Street, and not at 37.

Messrs. Lindsay who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. Blenkiron & Co., 37, Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods, thus fraudulently obtained from Messrs. Lindsay, to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who were bona fide purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the Mayor's Court of London by Messrs. Lindsay, the junior partner of which firm, Mr. Thompson, made the ordinary affidavit of debt, as against Alfred Blenkarn, and therein named Alfred Blenkarn as the debtor. Blenkarn's fraud was soon discovered, and he was prosecuted at the Central Criminal Court, and convicted and sentenced.

Messrs. Lindsay then brought an action against Messrs. Cundy as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice Blackburn, who left it to the jury to consider whether Alfred Blenkarn, with a fraudulent intent to induce the

Plaintiffs to give him the credit belonging to the good character of Blenkiron & Co., wrote the letters, and by fraud induced the Plaintiffs to send the goods to 37, Wood Street—were they the same goods as those bought by the Defendants—and did the Plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the Defendants, with leave reserved to move to enter the verdict for the Plaintiffs. On motion accordingly, the Court, after argument, ordered the rule for entering judgment for the Plaintiffs to be discharged, and directed judgment to be entered for the Defendants, 1 Q. B. D. 348. On appeal, this decision was reversed and judgment ordered to be entered for the Plaintiffs, Messrs. Lindsay, 2 Q. B. D. 96. This appeal was then brought.

The Lord Chancellor (Lord Cairns). My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well known rules of law. Now, with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a de facto contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present Appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done, the whole history of the whole transaction lies upon paper. The principal parties concerned, the Respondents and Blenkarn, never came in contact personally—everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the Respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the Respondents; that by all those means he led, and intended to lead, the Respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought.

With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is de facto a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the Respondents, and the title which was attempted to be given to the Appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.[67]

## RODLIFF et al. v. DALLINGER.

(Supreme Judicial Court of Massachusetts, 1886. 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439.)

Replevin of twenty bags of California wool. Trial in the Superior Court, before Knowlton, J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs, under the firm name of Rodliff and Eaton, were wool dealers in Boston, and, on or about November 15, 1882, delivered the wool in controversy to one Henry Clementson, a wool dealer and broker in Boston, as hereinafter stated.

The defendant was a public warehouseman in Boston, who received the wool in question on storage from Clementson, on or about said November 15, 1882, not knowing where he obtained it, and issued a warehouse receipt for the same, described hereafter.

On the day after the delivery of said wool, Clementson applied to the Massachusetts Loan & Trust Company of Boston, a corporation whose business is that of advancing money upon staple merchandise, for a loan of $2,000 on said wool, then in the public warehouse of the defendant. The company sent a man to the warehouse to examine the wool, and, on his report, made a loan of $2,000 to Clementson, taking the warehouse receipt of the defendant, reciting that the wool had been received from Clementson and placed on storage for account of the

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[67] Concurring opinions were delivered by Lords Hatherley and Penzance.

Massachusetts Loan & Trust Company, the company having no knowledge where Clementson obtained the wool, his statement being that he had purchased the wool to sell upon the market; and the company, being the real party in interest, defended this action.

The plaintiff Rodliff testified that, in September, 1882, his firm sold and delivered to Clementson certain California wool, of the value of about $2,000, entered the same on their books as sold to him, and made out a bill of sale directly to him, the wool being sold on sixty days' time, which wool was duly paid for by Clementson; that afterwards, prior to November 14 of that year, the plaintiffs made two other sales to Clementson out of the same lot of California wool, which had been consigned to them for sale; that Clementson, acting as broker in each of these last two sales, received his brokerage, and gave the name of the persons for whom the wool was purchased, namely, Pomeroy & Sons, of Pittsfield; that the wool in both these cases was charged to Pomeroy & Sons on the books of the plaintiffs, together with the entry of brokerage to Clementson; that a bill was also made out directly to Pomeroy & Sons; and that in both these cases the wool was sold on time, and was duly paid for.

On or about November 14, 1882, one of the plaintiffs had an interview with Clementson, about which he testified as follows: "He came in and brought an offer of twenty-two and one fourth cents per pound for some manufacturer. This was for twenty bales of the same lot of California wool. Finally he said he did not want us to know who the manufacturer was; he wanted to conceal that. I told him I did not know how he could get over it, for I would not sell him that amount or anywhere near it. We made an arrangement that we were to let him have the wool, and were not to lose our claim upon it, but he was to hand us over whatever he got for it as soon as he got it. I said we would weigh up that wool, and he was to hand us over the check as soon as he got it." The witness was present when the wool was loaded on the wagon Clementson sent to receive it. The plaintiffs did nothing about collecting pay for the wool until they had learned that Clementson had left the country, and made no inquiry of him relating to the same, the sixty-one days' credit not having then expired.

The plaintiffs asked Clementson who the parties were, and he would not tell them, but said they were as good as Pomeroy & Sons, who were in good standing and credit with the plaintiffs.

The wool was sold on sixty-one days' credit, and was entered on the books of the plaintiff as a direct sale to Clementson, and a bill of parcels was made directly to Clementson, as in the sale to him in September, and no mention was made, either on the books or on the bill, of any other person, or of any brokerage. * * *

It was an undisputed fact that Clementson had not any such offer, and did not act for any such person as the plaintiffs testified that he represented at the time of obtaining the wool.

The judge instructed the jury that there were three possible views of the transaction: (1) That they might find it was an ordinary sale to Clementson; or (2) that it was not a sale to Clementson, but was a delivery to Clementson as a broker, with a view to his selling it to some customer, whom he expected afterward to negotiate with, and to consummate a sale with him; and if they found this, then there was a special provision of the statute which protects persons dealing in good faith with a broker having property in that way, so far as they make advances or loans upon property in pledge, in good faith, to persons who have custody of property as brokers, with authority to sell or dispose of it; or (3) that it was not a sale to Clementson, or a delivery to him as broker with authority to sell, but that it was a delivery to Clementson upon his representation that he came from a purchaser representing him, with an offer for it,—a purchaser whose name he did not disclose,—and that these goods were delivered to him as the agent of that purchaser,—as a sale to that purchaser; and if this was the fact, that the plaintiffs were entitled to the property, notwithstanding it was subsequently pledged to the Massachusetts Loan & Trust Company.

The judge further instructed the jury upon the third view "that if this was a transfer upon a false representation made by Clementson,—a representation that he came with an offer from a third person whose name he did not wish to disclose,—and the goods were delivered to Clementson as a sale to him as the agent of this third person, whose offer he was bearing, with the view that the property should pass at the time to that third person, and thus constitute a sale to such person, from whom payment was to be made subsequently, and the payment to be brought back by Clementson as the agent of that third person, Clementson had no right afterward to deal with that property at all. He got it into his possession by fraud, and he got it into his possession without any authority to make any subsequent sale or to do anything with it; and that it was wrongly in his possession from the start, and any person who saw fit to advance money upon it or to buy it, however honestly, and in perfect good faith, would be the loser, and the plaintiffs could pursue the property, and get it wherever they could find it, whenever the fraud practiced upon them should come to their knowledge."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.[68]

HOLMES, J. The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer in good credit with the plaintiffs. This evidence was not objected to, and was admissible, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson, and that a bill was made to him. Com. v. Jeffries, 7 Allen, 548, 564, 83 Am. Dec. 712. It was admitted that Clementson in fact was not acting for such an undisclosed principal, and it follows that, if the plaintiffs' evidence was believed, there was no sale. There could not be one to this supposed principal, because there was no such person; and there was not one to Clementson, because none purported to be made to him; but, on the contrary, such a sale was expressly refused, and excluded. Edmunds v. Merchants' Despatch Transp. Co., 135 Mass. 283; Aborn v. Same, Id.

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[68] Part of the statement of facts is omitted.

It was suggested that this case differed from the one cited, because there the principal was disclosed, whereas here he was not, and that credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason, in Clementson's representations, for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party, and if the jury find that such a sale was the only one that purported to be made, the fact that it failed does not turn it into a sale to the party conducting the transaction. Schmaltz v. Avery, 16 Q. B. 655, only decided that a man's describing himself in a charter-party as "agent of the freighter" is not sufficient to preclude him from alleging that he is the freighter. It does hint that the agent could not be excluded by express terms, or by the description of the principal, although insufficient to identity the individual dealt with, as happened here; still less, that, in favor of third persons, the agent would be presumed, without evidence, to be the undisclosed principal, although expressly excluded.

The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as, when a vendee expressly or impliedly represents that he is solvent, and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or, being identified by the senses, and dealt with as the person so identified, says that he is A. when in fact he is B. But when one of the formal constituents of a legal transaction is wanting, there is no question of rescission,—the transaction is void ab initio,—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake.

The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementson gave him no power to convey a good title to a bona fide purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting bona fide dealers with persons in possession, in cases like the present, were much urged in Thacher v. Moors, 134 Mass. 156, but did not prevail. Much less can they be allowed to prevail against a legal title without the intervention of statute.

Exceptions overruled.[69]

## SWIFT v. ROUNDS.

(Supreme Court of Rhode Island, 1896. 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791.)

Tillinghast, J. This is trespass on the case for deceit. The first count in the declaration alleges that the defendant, intending to deceive and defraud the plaintiffs, did buy of them on credit certain goods and chattels, of the value of $400; the said defendant not then and there intending to pay for the same, but intending wickedly and fraudulently to cheat the plaintiffs out of the value of said goods and chattels, which said sum of $400 the defendant refuses to pay, to the plaintiffs' damage, etc. The second count, after setting out the fraudulent conduct aforesaid, alleges that the defendant thereby then and there represented that he intended to pay for said goods, but that he did not then and there intend to pay for the same, but wickedly and fraudulently intended to cheat the plaintiffs out of the value of said goods and chattels, etc.

To this declaration the defendant has demurred, and for grounds of demurrer to the first count thereof, he says: (1) That the plaintiffs do not allege any false representation by the defendant; (2) that the plaintiffs do not allege that they have acted upon any false representation of the defendant; and (3) that the plaintiffs do not allege any damage suffered by them in acting upon any false representation of the defendant. The grounds of demurrer to the second count are: (1) That the plaintiffs do not allege any false representation by the defendant as to any fact present or past, but only as to something that would happen in the future, which, if in the future it proved not to be true, would not be the subject-matter of a false representation, but simply a promise broken, and therefore not a ground of an action of deceit; (2) that the plaintiffs do not allege that they acted upon any false representation made by the defendant; and (3) that the plaintiffs do not allege that they suffered any damage by acting upon any false representation made by the defendant to the plaintiffs.

We are inclined to the opinion, after some hesitation, that the declaration states a case of deceit. Any fraudulent misrepresentation or device, whereby one person deceives another who has no means of detecting the fraud, to his injury and damage, is a sufficient ground for an action of deceit. Deceit is a species of fraud, and consists of any false representation or contrivance whereby one person overreaches and misleads another, to his hurt. And, while the fraudulent misrepresentation relied upon usually consists of statements made as to material facts, either verbally or in writing, yet it may be made by conduct as well. Grinnell, Deceit, p. 35. A man may not only deceive another to his hurt by deliberately asserting a falsehood, as, for instance, by stating that A. is an honest man when he knows him to be a rogue, or that a horse is sound and kind when he knows him to be unsound and vicious, but also by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief, and form the basis of some change of position by him. 1 Story, Eq. Jur. § 192.

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[69] Compare Stoddard v. Ham. 129 Mass. 383, 37 Am. Rep. 369 (1880).

In Ex parte Whittaker, 10 Ch. App. 449, Mellish, L. J., says: "It is true, indeed, that a party must not make any misrepresentation, express or implied; and, as at present advised, I think Shackelton, when he went for the goods, must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown." See, also, Lobdell v. Baker, 1 Metc. (Mass.) 201, 35 Am. Dec. 358; 1 Benj. Sales (Ed. 1888) § 524.

In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them, but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs, the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words or even in writing. The plaintiffs had the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the contrary, was made for the purpose of deceiving the plaintiffs into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then consisted in the making of the promise, in the manner aforesaid, with the intent not to perform it. By the act of purchasing the goods on credit the defendant impliedly represented that he intended to pay for them. The plaintiff relied on this representation, which was material and fraudulent, and was damaged thereby. All the necessary elements of fraud or deceit, therefore, were present in the transaction. See Upton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; Bartholomew v. Bentley, 15 Ohio, 666, 45 Am. Dec. 596; Bish. Noncont. Law, §§ 314-318; Burrill v. Stevens, 73 Me. 400, 40 Am. Rep. 366; Barney v. Dewey, 13 Johns. (N. Y.) 226, 7 Am. Dec. 372; Hubbell v. Meigs, 50 N. Y. 491.

The general doctrine which controls this action is fully reviewed by Mr. Wallace in a note to Pasley v. Freeman, 2 Smith, Lead. Cas. 101.

As said by Bigelow (Frauds, p. 484): "To profess an intent to do or not to do, when a party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made." See, also, page 466, as to what constitutes a representation. In Goodwin v. Horne, 60 N. H. 486, the court say: "Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable, or can be made the ground of defense. * * * But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense. Such are cases of concealed insolvency and purchases of goods with no intention to pay for them."

In Byrd v. Hall, 1 Abb. Dec. (N. Y.) 286, it was held that, although a purchase of goods on credit by one who knows himself to be insolvent is not fraudulent, yet, where it is made with a preconceived design not to pay, it is fraudulent. See, also, Mulliken v. Millar, 12 R. I. 296; Thompson v. Rose, 16 Conn. 81, 41 Am. Dec. 121; Hennequin v. Naylor, 24 N. Y. 139; Devoe v. Brandt, 53 N. Y. 465; Story, Sales (2d Ed.) § 176, and cases in note 2; Douthitt v. Applegate, 33 Kan. 395, 6 Pac. 575, 52 Am. Rep. 533; Morrill v. Blackman, 42 Conn. 324; Skinner v. Flint, 105 Mass. 528; Earl of Bristol v. Wilsmore, 2 Dowl. & R. 760; Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Cooley, Torts (2d Ed.) 559; Load v. Green, 15 Mees. & W. 215.

In short, the making of one state of things to appear to those with whom you deal to be the true state of things, while you are acting on the knowledge of a different state of things,—among the oldest definitions of fraud in contracts,—is exemplified in this case. See Lee v. Jones, 17 C. B. (N. S.) 494. The defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them; and to hold that such a transaction does not amount to fraud would be to make it easy for cheats and swindlers to escape the just consequence of their unrighteous acts.

We have hesitated somewhat in arriving at the conclusion that an action of deceit will lie upon the facts set out in the declaration for the reason that, among the numerous cases of fraud and deceit to be found in the books, we have not been referred to any, nor have we been able to find any, where the action of deceit was based simply on the act of buying goods on credit, intending not to pay for them. In Lyons v. Briggs, 14 R. I. 224, 51 Am. Rep. 372, which was an action of deceit, Durfee, C. J., intimates, however, that deceit would lie, in a case like the one before us, by the use of the following language: "It is not alleged that the buyer did not intend to pay when he bought, but only that he falsely and fraudulently asserted that he could be safely trusted." But the authorities are overwhelming to the effect that it is a fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may repudiate the sale and reclaim the property, or may sue in trover or in some other action of tort for the damages sustained by the fraud. And, this being so, we fail to see why an action of deceit, which is an action of tort based on fraud, may not lie as well; for to obtain goods on credit, intending not to pay for them, is as much a trick or device as it would be to falsely represent in words any material fact whereby the vendor should be induced to part therewith.

But defendant's counsel contends that the alleged representation was not as to any fact, present or past, but merely as to what the defendant would do in the future with reference to paying for the goods, and that to say what one intends to do is identical to saying what one will do in the future, which amounts simply to a promise; and, furthermore, that a representation of what will happen in the future, even if not realized, is not such a representation as will support this action. We do not assent to this method of reasoning. The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact. Clift v. White, 12 N. Y. 538. Hence a witness may be asked with what intent he did a given act. Seymour v. Wilson, 14 N. Y. 567. A man who buys and obtains possession of goods on credit, intending not to pay for them, is then and there guilty of fraud. The wrong is fully completed, and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover for the wrong and injury sustained. It is true the purchaser may afterwards repent of the wrong and pay for the goods, and the vendor may never know of the wrongful intent. But this does not alter the case at all as to the original wrong, and the liability incurred thereby. Of course, a mere intention to commit a crime or to do a wrong is no offense; but, when the intention is coupled with the doing or accomplishment of the act intended, that moment the wrong is perpetrated, and the corresponding liability incurred. See Starch Factory v. Lendrum, 57 Iowa, 582, 10 N. W. 900, 42 Am. Rep. 53.

In Stewart v. Emerson, 52 N. H. 301, where it was alleged, in reply to the defendant's plea of discharge in bankruptcy, that the debt in question was created by the fraud of the defendant. Doe, J., in the course of a long and vigorous opinion, used the following language, which is so apt and pertinent that we quote it. He said: "When the intent not to pay is concealed, the intent to defraud is acted out. The mere omission of A. to disclose his insolvency might not be satisfactory proof of a fraudulent intent in all cases. He might expect to become solvent. He might intend to pay all his creditors. He might intend to pay B., though unable to pay others. His fixed purpose never to pay B. is a very different thing from his present inability to pay all or any of his creditors. A man may buy goods, with time for trying to pay for them, on the strength of his known or inferred disposition to pay his debts, his habits, character, business capacity, and financial prospects, without his present solvency being thought of, and even when his present insolvency is known to the vendor. But who could obtain goods on credit with an unconcealed determination that they should never be paid for? The concealment of such a determination is conduct which reasonably involves a false representation of an existing fact, is not less material than a misrepresentation of ability to pay (Bradley v. Obear, 10 N. H. 477), and is an actual artifice, intended and fitted to deceive. * * * An application for or acceptance of credit by a purchaser is a representation of the existence of an intent to pay at a future time, and a representation of the nonexistence of an intent not to pay. What principle of law requires a false and fraudulent representation to be express, or forbids it to be fairly inferred from the act of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as a means of converting another's goods to his own use without compensation, under the false pretense of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is of course concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud."

Demurrer overruled, and case remitted to the common pleas division for further proceedings.[70]

## WHITE v. GARDEN.

(Court of Common Pleas, 1851. 10 C. B. 919.)

Trover for iron. Pleas—first, not guilty; secondly, not possessed.

At the trial, before Jervis, C. J., at the sittings in London, after the last term, the evidence disclosed the following facts:

One Parker, in August, 1850, bought of the defendants seventy tons of iron, paying for it £83. in cash, and giving a bill for the residue, £113. 14s., purporting to be accepted by one Thomas, a seedsman at Rochester. Parker afterwards sold the iron to the plaintiff, to whom it was, by Parker's order, delivered by the defendants.

On the 1st of October, Parker made a further purchase of fifty tons of iron from the defendants, for which he gave them a bill also purporting to be accepted by Thomas. This second parcel of iron was likewise sold by Parker to the plaintiff, and was forwarded to the plaintiff's wharf on the 4th of October, by one Riddell, the defendants' lighterman, pursuant to a delivery order signed by Parker on the 3d. The barge containing the fifty tons was left, with the delivery order by Riddell, alongside the plaintiff's wharf to be unloaded. Subsequently, the defendants, having discovered that the supposed acceptor of the bills was a fictitious person, and that they had been defrauded, sent Riddell to the plaintiff's wharf to get back the iron. Riddell accordingly took away the lighter, with twenty-nine tons of the iron which remained therein: and the defendants gave the plaintiff notice of the fraud, and desired him not to part with any of the iron in his possession purchased of Parker.

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[70] But see Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51 (1853); Dawe v. Morris, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404 (1889); Williston, Sales, § 637.

The purchases were bona fide on the part of the plaintiff, and had been made at the fair market price, and through the intervention of a broker.

It appeared that Parker had given the defendants a false address: but it did not appear that the defendants had made any inquiry either about him or the acceptor of the bills, until after the iron had been sent by them to the plaintiff's wharf.

On the part of the defendants, it was insisted, that, the transaction being a fraud on the part of Parker, no property in the iron passed to him, and consequently none could be acquired by his vendee, though no party to the fraud.

For the plaintiff, it was submitted, that the right in the original vendors to rescind the sale, was at an end when the goods had come to the hands of a bona fide purchaser for value.

The lord chief justice left four questions to the jury—first, whether the plaintiff had purchased the iron from Parker, bona fide; secondly, whether there had been a delivery of the iron by the defendants to the plaintiff; thirdly, whether Parker had obtained the iron animo furandi; fourthly, whether he had obtained it by fraud. The jury answered the first two questions in the affirmative, and the third in the negative: but, as to the fourth, they said they could not agree in finding fraud, though they were all of opinion that Parker never intended to pay for the iron.

His lordship thereupon directed a verdict to be entered for the plaintiff, for £75., the value of the twenty-nine tons of iron removed from alongside the plaintiff's wharf,—leave being reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that no property in the iron passed by the sale from Parker to the plaintiff.

Cresswell, J. I am of opinion that this rule must be discharged. It appears that the plaintiff made a contract with Parker for the purchase of fifty tons of iron. It may be very doubtful whether Parker had the iron at the time. But afterwards (or before, as the case may be) he purchased fifty tons of iron from the defendants, giving them in payment a bill purporting to be accepted by a supposed seedsman at Rochester. It turned out that that was a fictitious bill; no such person as that described as the acceptor being to be found at Rochester. The transaction on the part of Parker was altogether fraudulent. Having thus by fraud induced the defendants to trust him, Parker sells the iron to the plaintiff, and gives him a delivery order, which is acted upon by the defendants, who send the iron to the plaintiff's wharf by their own lighterman. Having received the iron alongside his wharf, the plaintiff pays Parker for it; and the defendants afterwards, having in the interim discovered that they had been defrauded, seize the iron.

The question is, whether the plaintiff, who it is admitted acted bona fide, by this purchase obtained a property in the iron. It seems to me that the case of Parker v. Patrick, as explained in Load v. Green, well warrants us in discharging this rule. Parke, B., there says that that case may be supported on the ground that the transaction is not absolutely void, except at the option of the seller; that he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such, and re-sold the goods to a third party; and that Wright v. Lawes is an authority to the same effect. I think it is. And I see no difficulty or hardship in so deciding. One of two innocent parties must suffer: and surely it is more just that the burthen should fall on the defendants, who were guilty of negligence in parting with their goods upon the faith of a piece of paper which a little inquiry would have shown to be worthless, rather than upon the plaintiff, who trusted to the possession of the goods themselves. Though Parker could not have enforced the contract, I see no reason why the plaintiff should not.

Rule discharged.[71]

## SALTUS v. EVERETT.

(Court for the Correction of Errors of New York, 1838. 20 Wend. 267, 32 Am. Dec. 541.)

Error from the Supreme Court.

Everett brought an action of trover in the superior court of law of the city of New-York against Messrs. Saltus, for a quantity of lead. In August, 1825, Bridge & Vose, merchants at New-Orleans, shipped 179 pigs of lead on board the brig Dove, of which William Collins was master, consigned to Messrs. Tufts, Eveleth, & Burrell, of New-York, on account and risk of Otis Everett, the plaintiff, to whom they were referred for instructions. The Dove put into Norfolk in distress, and part of the lead was sold to pay expenses, and the residue was transferred in December, 1825, by an agent of Capt. Collins, to the schooner Dusty Miller, Captain Johnson, who signed a bill of lading, acknowledging the lead to have been shipped by F. M., agent for William Collins, and promising to deliver the same in New-York, to order, on payment of freight. The Dusty Miller met with a disaster on her voyage to New-York, and on her arrival there, the lead, by the order of Capt. Collins, was delivered to the firm of Coffin & Cartwright, who paid the freight, and $72.87, the average contribution, charged upon the lead, for the loss occasioned by the disaster to the Dusty Miller. On the 9th March, 1826, Coffin & Cartwright sold the lead to the Messrs. Saltus, the defendants, for $542.74, and received payment. The freight of the lead from New-Orleans to New-York, amounted to $14.72.

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[71] Concurring opinions were rendered by Williams and Talfourd, JJ., and Jervis, C. J.

Everett brought an action against Coffin & Cartwright, to recover the value of the lead, but was nonsuited, in failing to prove that before suit brought, he offered to pay the freight, average and charges to which the lead was liable, and which had been advanced by Messrs. Coffin & Cartwright, and this court, on application, refused to set aside the nonsuit. (See 6 Wendell, 603.) In October, 1831, the plaintiff demanded the lead of the Messrs. Saltus, and offered to pay any lawful demands they had on the same; to which they answered, that they would have no further communication on the subject. It was proved that in March, 1826, one of the firm of Tufts, Eveleth, & Burrell demanded of the Messrs. Saltus, the lead, or its value, and received for answer, that they had bought the lead, and paid for it, and would not do anything about it. Upon this evidence the plaintiff was again nonsuited. Whereupon he sued out a writ of error, removing the record into the supreme court, where the judgment of the superior court was reversed. See opinion delivered in the supreme court. (15 Wendell, 475, et seq.) The defendants then removed the record into this court.

Senator VERPLANCK.[72] * * * The main question depends upon and involves the general rule that ought to govern, between the conflicting rights of bona fide purchasers of personal property, bought without notice of any opposing claim, and those of the original owner, divested of the possession or control of his property by accident, mistake, fraud, or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property, (a bill of lading endorsed to them,) and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrong doing of the third?

The universal and fundamental principle of our law of personal property, is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. That "no one can transfer to another a better title than he has himself;" is a maxim, says Chancellor Kent, "alike of the common and the civil law, and a sale, ex vi termini, imports nothing more than that the bona fide purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was, that of sales in markets overt, a custom which has not been introduced among us. "It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently as a general rule, the title of the true owner cannot be lost without his consent." 2 Kent's Comm. 324, and cases there cited.

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[72] Part of the opinion is omitted.

To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. The chief justice of the superior court has said, in his opinion on this case, that "it must be conceded that a purchaser for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim or any suspicious circumstances to awaken inquiry, or to put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claim. But there are exceptions to this rule." Now, I cannot agree with the learned chief justice that this is the general rule. On the contrary, I think it obvious that it is but the broad statement of a large class of exceptions to the operation of a much more general principle, and that statement of exceptions is subject again to many limitations. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

The first and most remarkable class of these exceptions relates to money, cash, bank bills, checks, and notes payable to the bearer or transferable by delivery, and in short whatever comes under the general notion of currency. It was decided by Lord Chief Justice Holt. at an early period of our commercial law, that money and bills payable to bearer, though stolen, could not be recovered after they had passed into currency; and this "by reason of the course of trade which creates a property in the holder." "They pass by delivery only, and are considered as cash, and the possession always carries with it the property." Anon., 1 Salk. 126. A long series of decisions, beginning with Miller v. Race, 1 Burr. 452, has now settled the law, that possession of such paper is presumptive proof of property, and that he who received it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances. These decisions have been argued upon as authorities (at least in the way of analogy) both at bar and in opinions of the courts, in cases involving the same question as to goods or other movable property. Hence, it was inferred that goods bought or received "in the course of trade, stand on the same footing with bank notes or checks so received." But an examination of the cases will show that this part of the law of negotiable paper rests on grounds quite peculiar to itself, for the following reasons:

1. The protection of the bona fide holder of paper, transferable by delivery, extends even to cases where the paper has been lost or stolen. But it has been often decided that loss by accident, theft, or robbery, does not divest the title of the owner of goods, nor give a title in them to a fair after purchaser.

2. The rule is put by all the authorities on the express and separate ground of the necessity of sustaining the credit and circulation of the currency. Thus Lord Chief Justice Hardwicke: "No dispute ought to be made with the holder of a cash note, who came fairly by it, for the sake of currency, to which discrediting such notes would be a great disturbance." See, too, the reasoning of Lord Mansfield, in all cases on this head decided before him. Thus, says he, in the case of a stolen note, Peacock v. Rhodes, 2 Doug. 636: "An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills, it would stop their currency." Similar reasons are assigned for the same decision by American judges.

3. The analogy between notes and moveables or goods, is expressly denied in the leading cases on this head. Thus, in reply to an argument founded on that similarity, Lord Mansfield answers, (Miller v. Race, 1 Burr. 457:) "The whole fallacy of the argument rests upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz., goods, or securities, or documents for debts. Now, they are not goods, nor securities, nor similar to them; they are treated as cash to all purposes," &c.

Setting wholly aside, then, this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state, that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration, in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has by his own direct voluntary act conferred upon the person from whom the bona fide vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

I. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error, as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a bona fide purchaser in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner. Mowrey v. Walsh, 8 Cow. 243. So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner. Root v. French, 13 Wend. 572, 28 Am. Dec. 482. See, also, McCarty v. Vickery, 12 Johns. 348. In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only obtained by fraud or mistake, and therefore revocable against such unfair first purchaser.

II. The other class of cases in which the owner loses the right of following and reclaiming his property is, where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner "has given the external indicia of the right of disposing of his property." Here it is well settled that, however the possessor of such external indicia may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

Thus, the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the bona fide holder of the bill endorsed by the consignee is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose endorsement he holds, has no right to the goods as against the former owner. If such goods were not paid for, they might be stopped in transitu by the owner, unless his consignee has already assigned his bill of lading; but that assignment divests the owner of his right of stoppage against such assignee.

The famous series of decisions in the various courts in the case of Lickbarrow v. Mason, (2 T. R. 63; 2 H. Black, R. 211; 5 T. R. 367,) which led to the establishment of the doctrine of this qualified negotiability of bills of lading, memorable alike in legal and commercial history, strongly illustrates the whole question before us. There, Buller and his associate judges, trained up at the feet of the great father of English commercial jurisprudence, maintained and established the law as we now hold it, under the influence of Mansfield's genius upon his reasoning and on his authority, against those of Lord Loughborough and others, the most learned lawyers of their times. All the arguments and admissions of both sides show how deeply the general principle is rooted in the law of England, that (to use Lord Loughborough's words) "mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery must take the hazard of the title of its author."

It is only as an express exception to this rule that it was maintained, and finally established, that the custom of merchants, evidenced and sanctioned by legal decisions, and founded on those conveniences of trade, so admirably stated by Buller, had compelled the courts to consider the owner as giving his consignee evidence of the power of disposal, which it was not for him to dispute when the goods had fairly passed into other hands, on the faith of that evidence. But there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently, as in this present case. The assignment of the bill of lading conveys, not an absolute right to goods, but the right and title merely of the actual consignor, who alone is bound by it.

Again: The owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances. "If a man," says Bayley, J., in Pickering v. Busk, 15 East, 44, "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell," and the cause was decided on that ground. But this implied authority must arise from the natural and obvious interpretation of facts, according to the habits and usages of business; and it never applies where the character and business of the person in possession, do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, to use an illustration of Lord Chief Justice Ellenborough, in the case just cited, a person entrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner or agent, and credit is not given as such, because he has possession of the watch, the owner, therefore, would not be bound by his sale. When these exceptions cease, the general rule resumes its sway; and the law is therefore clear, that an agent, for a particular purpose, and under a limited power, cannot bind his principal if he exceed his power. "Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power." 2 Kent's Comm. 621, and the authorities there cited.

Beyond the precise exceptions I have above stated I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent. Among the numerous cases to this effect, I will cite only that of Hoare v. Parker, 2 T. R. 376, which I select not only on account of the strong and unhesitating manner of the decision, but because it was pronounced by the very judges who, in the case of Lickbarrow v. Mason, had carried the protection of a bona fide purchaser under a bill of lading far beyond the rigor of the ancient law. There, plate had been pawned by a widow who had only a life interest in it under her husband's will, of which fact the pawnee had no notice. It was not doubted that the lien for the moneys advanced on such pledge was void against the remainderman, after the widow's death. "Per curiam: This point is clearly settled, and the law must remain as it is, until the legislature think fit to provide that the possession of such chattels is proof of ownership."

In order to decide in such conflicts between the claims of equally meritorious sufferers by the wrong of a third party, public policy must draw an arbitrary line somewhere, and the greatest merit of such a rule must be its certainty and uniformity.

The rule of our law, as I understand it, is perfectly consistent with the equity between the parties, as far as such equity can apply; and it serves the great interests of commerce, in a state of such extensive foreign and domestic trade as ours, by protecting the property of the stranger, as well as of our own citizens, against the possible frauds of carriers by sea, or by internal transportation, whilst it throws upon the resident merchant the responsibility of taking care with whom he deals, and teaches him a lesson of wholesome caution. It is no mean proof of the wisdom of the rule, that it agrees in substance with the provisions of the Napoleon Code.

The Code, like our law, holds as a general rule, that the sale of goods by any but the true holder, is a nullity; "La vente de la chose d'autrui est nulle." Code Civil III. art. 1599. It confines the authority of the special agent or mandataire to the strict limits of his power; and in sales, the power must always be special and express. Code Civil, art. 1989. It allows the right of revendication or stoppage in transitu against the insolvent or fraudulent purchaser or consignee; but that right ceases, as with us, against the consignee, when the goods have been fairly sold according to the bills of lading; "vendues sans fraude sur factures et connaissements." Code de Commerce, Liv. III., art. 576, 577, 578.

The Scotch law, as I gather from Bell's Commentaries, lays down a different rule, that "a purchaser, in the course of trade, should be protected in the purchase of goods from any one who has them in lawful possession." This agrees with the doctrine of our superior court, and might be a safe enough rule if generally adopted and understood. But it is not the rule of our own law, which is perhaps quite as wise, as well as certainly founded on a much larger and wider commercial experience.

Let us apply these conclusions to the present case. Collins, the person whose sale it is asserted must divest the original owner of his rights in favor of the bona fide purchaser, stands, it is said by the superior court, in a double relation of "a master, who is at the same time the consignee of the goods, and who himself filled the character of shipper, and has therefore an undoubted power to sell, and his bona fide transfer will be effectual to purchasers against any secret trust for others with which his apparent title might be affected." Had the lead been consigned to Collins from the intermediate port, by the owner or his agent, this would be true. But it is shipped by Myers, of whom neither the owner, nor any one with full power to represent him in this matter, had any knowledge as an agent, and under whose care the vessel and cargo were placed by Collins, so that he appeared only as his representative, and thus he styles himself in the bill of lading.

The plaintiff below comes in no wise within the rule I have stated. He has neither given to Collins documentary and mercantile evidence of property in a bill of lading from himself or his own agent with competent power, nor the evidence customary in business, such as to hold him out as an agent authorized to change the title of his property in his goods. The assumed authority of shipping goods in his own name and to his own order, at Norfolk, and the documentary evidence of it in the bill of lading, can have no more effect as to the title of the property, than if he had forged such a bill of lading at New Orleans.

Neither does the selection of a ship and its master vest in the master any implied authority to sell the ship, or any part of her cargo. His business is to carry the goods, and no more, with some other clearly defined and very limited powers, to be exercised only in cases of absolute necessity. He stands in the same legal relation to his cargo with the watchmaker, in the case supposed by Lord Ellenborough, who has in his hands a watch to be repaired. He is not exhibited to the world as the owner, or agent for selling: and if he does sell it, the sale is void against the true proprietor.

The law of shipping is well known to the commercial world, to declare that the master has no authority to sell the cargo, or any part of it, unless under circumstances of pressing necessity abroad; and of that absolute necessity, the burden of proof rests on the purchaser, and the presumption is against it. As Judge Bayley states the law, (Morris v. Robinson, 3 Barn. & Cress. 196,) "The captain has no right to act as agent for the owner of the goods, unless in absolute necessity. The purchaser obtains no property by the act of his professing to sell." And this was held where the master acted in perfect good faith. How much stronger is the case of a probable fraud! Thus again, in Freeman v. East India Co., 5 Barn. & Ald. 619, Abbott, C. J., says, "a sale of a cargo, or any part of it, by the master, can confer no title, unless there was an absolute necessity;" and the reason of the rule is thus assigned by Judge Best in the same case: "A carrier by sea and by land stands in the same relation to the owner of goods to be carried. Their duty is to carry the goods, and the authority only such as is necessary. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he buys, will assure himself that there is a real necessity for the sale before he makes the purchase; and caution on his part will prevent what has frequently happened, the fraudulent sale of ships and cargoes in foreign ports."

Such, then, being the well-settled and generally known law, the selection of a master or any other carrier, by sea or land, does nothing to exhibit such a carrier to the world as having the power of disposing of the goods he carries. The owner does nothing to enable him to commit a fraud on third persons. He gives merely a qualified possession, and if that is turned into an assumed right of ownership, it is tortious conversion, and will not divest the owner's title.

It is true that the rule will sometimes, as was urged by Chief Justice Jones, "involve purchasers in great perils;" but that peril can scarcely be called "unreasonable," since there is a reason of public policy of at least equal weight to counterbalance this inconvenience. It is the same which is the ground of the absolute prohibition to a master or carrier to sell the goods he transports except under insurmountable necessity; it is to prevent, in the language of the court in the case just quoted, (5 Barn. & Ald. 623,) "fraudulent sales of ships and cargoes in foreign ports." Now the fraudulent consignments or change of the apparent evidence of property for the purpose of selling elsewhere, is but another form of the same evil. I may add that this same rule, however rigid and occasionally hard in its operations is no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal though qualified possession of agents, sailors, carriers, boatmen, servants, and clerks, as well as of those who may have them stored for safe keeping, and their clerks, porters, and servants. * * *

Judgment unanimously affirmed.[73]

## BARNARD et al. v. CAMPBELL et al.

(Court of Appeals of New York, 1874. 55 N. Y. 456, 14 Am. Rep. 289.)

Appeal from order of the General Term of the Supreme Court in the First Judicial Department, reversing a judgment in favor of plaintiffs and granting a new trial.

This was an action of replevin to recover possession of 1,370 bags of linseed.

Defendants, who were merchants in New York, had, prior to August 21st, 1863, been negotiating with one E. P. Jeffries, of Boston. for the purchase of a quantity of linseed; the negotiations were closed on the twenty-first, by a sale of Jeffries, through his broker in New York, of 1,800 bags. Pursuant to the terms of sale, defendants, on the same day, mailed to Jeffries their notes for the seed purchased, which were received by him and immediately pledged as collateral for a loan. During these negotiations, Jeffries had been negotiating with plaintiffs, at Boston, for the purchase of linseed, and on the twenty-first contracted for 1,800 bags. It was disputed upon the trial whether the sale was to be for cash or upon a ten days' credit. On the twenty-fourth of August, plaintiffs, induced by fraudulent representations upon the part of Jeffries, delivered to him an order for 1,370 bags, which were delivered to him and shipped to defendants. A bill of lading taken deliverable to them, which was forwarded by mail on the twenty-fifth. Jeffries failed on the twenty-seventh. On the arrival of the seed in New York, it was demanded by plaintiffs.

Further facts appear in the opinion.

Allen, J. The only question involved in the action is, whether the plaintiffs and original owners, or the defendants, the purchasers from Jeffries, the fraudulent vendee of the plaintiffs, have the better title to the merchandise in controversy. That as against Jeffries, the right of the plaintiffs to rescind the sale and reclaim the goods, by reason of the fraud of the latter, is perfect, is conceded, and was so held upon the trial. Such right continues as against any one acquiring title under Jeffries, unless under well-recognized principles of law, and under the circumstances of this case Jeffries could transfer a better title than he had, or the plaintiffs by their acts are estopped from asserting title as against a purchaser from him.

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[73] A concurring opinion was delivered by Chancellor Walworth.

But two questions of fact were submitted to the jury: 1. Whether the sale to Jeffries was for cash or upon credit; and, 2. If for cash, whether payment was waived and the goods delivered so as, but for the fraud, to vest the property in Jeffries.

The jury found, either that the sale was upon credit, or that the payment of the purchase-price, as a condition precedent to the delivery of the property to and the vesting of the title in Jeffries was waived, and that the delivery to him was absolute and unconditional; and the defendants had a verdict, under the instructions of the judge, that the equitable rule applied, that when one of two innocent parties must suffer loss by reason of the fraud or deceit of another, the loss shall fall upon him by whose act or omission the wrong-doer has been enabled to commit the fraud; and that the plaintiffs were in the position of a party who lets another have property unconditionally, and thereby enables him to sell the same and receive the purchase-price from a third person; and that in such case the purchaser takes the title. In other words, the plaintiffs were held to be estopped from claiming the goods from the defendants in case the jury found that there had been an unconditional delivery by the plaintiffs to Jeffries, notwithstanding as the judge at the circuit expressly declared, and as the evidence showed, the defendants purchased the goods from a broker of Jeffries in New York on the 21st of August, and paid for them the same day by transmitting their notes to Jeffries at Boston, who at once negotiated them; and Jeffries obtained neither the property nor any order for its delivery, or documentary evidence of title or of his purchase, until the 24th of the same month, three days after the transaction was consummated as between Jeffries and the defendants. That is, it was held at the circuit that the subsequently-acquired possession of Jeffries operated by relation to create an estoppel as of the 21st of August, in favor of the defendants and against the plaintiffs; and the jury were in terms instructed that the defendants were purchasers in good faith for value, and acquired a title paramount to that of the plaintiffs, and were entitled to a verdict; and they had a verdict and judgment upon this view of their rights.

That the defendants were purchasers in good faith, that is, without notice or knowledge of the fraud of Jeffries, or of the defects in his title, for a full consideration actually paid to Jeffries, is not disputed. Both plaintiffs and defendants are alike innocent of any dishonest or fraudulent intent, and one or the other must suffer loss by the frauds of one with whom they dealt in good faith, for legitimate purposes, and with honest intention. Both were alike the victims of the same fraudulent actor, and if one rather than the other of the parties has done any act enabling the fraud to be committed, and without which it could not have been perpetrated upon the other in the exercise of ordinary care and discretion, the loss should, within the rule before referred to, fall on that one of the parties aiding and abetting the fraud, or enabling it to be committed. But good faith, and a parting of value by the one, will not alone determine who should have the loss, or fix the ownership of the property fraudulently purchased from the one and sold to the other. The general rule is that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater. "Nemo plus juris ad alium transferre potest quam ipse habet." Broom Leg. Max. 452. The general rule of law is undoubted that no one can transfer a better title than he himself possesses. "Nemo dat quod non habet." Per Willes, J., Whistler v. Forster, 14 C. B. (N. S.) 248. To this rule there are however some exceptions, and unless the defendants are within the exceptions they must abide by the title of Jeffries.[74]

The defendants can only resist the claim of the plaintiffs to the merchandise by establishing an equitable estoppel, founded upon the acts of the plaintiffs, and in the application of the rule applied by the judge at the circuit, by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose act or omission the fraud has been made possible. This rule, general in its terms, only operates to protect those who, in dealing with others, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business and upon the ordinary evidences of right and authority in those with whom they deal, and as against those who have voluntarily conferred upon others the usual evidences or indicia of ownership of property, or an apparent authority to deal with and dispose of it. In such case, for obvious reasons, the law raises an equitable estoppel, and as against the real owner, declares that the apparent title and authority which exists by his act or omission shall quoad persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority. It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. Dyer v. Pearson, 3 B. & C. 38; Newsom v. Thornton, 6 East, 17; Dayton v. Kynne, 3 B. & A. 320; Ballard v. Burgett, 40 N. Y. 314. But the owner must go farther, and do some act of a nature to mislead third persons as to the true position of the title. Pickering v. Busk, 15 East, 38.

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[74] The court here considered the exceptions of negotiable paper, bills of lading, and sales in market overt.

Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered. 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels in pais. Weaver v. Barden, 49 N. Y. 286; McGoldrick v. Willets, 52 N. Y. 612; City Bank v. R., W. & O. R. Co., 44 N. Y. 136; Saltus v. Everett, 20 Wend. 267, 32 Am. Dec. 541; Wooster v. Sherwood, 25 N. Y. 278; Brower v. Peabody, 13 N. Y. 121.

In the case before us every element of an estoppel is wanting, and no case was made for the application of the rule by which, under some circumstances, one, rather than the other of two innocent persons, is made to bear the loss occasioned by the fraud of a third person.

The defendants consummated their purchase from Jeffries, acting through his broker in New York, and paid for the merchandise by remitting, at his request, directly to Jeffries on the 21st of August, at which time Jeffries had neither the possession nor right of possession of the property, nor any documentary evidence of title or any indicia of ownership, or of dominion over the property of any kind. The plaintiffs had done nothing to induce the defendants to put faith in or give credit to the claim of Jeffries of the right to sell the property. The defendants then parted with the consideration for the purchase of the seed, not upon the apparent ownership of Jeffries, but upon his assertion of right of which the plaintiffs had no knowledge, and for which they are not responsible. Neither did the defendants at any time do or forbear to do any act in reliance upon the apparent ownership of the property by Jeffries, or induced by any act or declaration of the plaintiffs. In Knights v. Wiffen, L. R., 5 Q. B. 660, the plaintiff was induced to rest satisfied under the belief that he had acquired title to the property purchased, and so to alter his position, by abstaining from proceedings to recover back the money which he had paid to his vendor, by the declaration of the defendant that it was all right, and his promise that when the forwarding note should be received he would put the barley on the line.

The defendants here at no time had any declaration or statement of the plaintiffs upon which to rely, and were not led to act or forbear to act by any documentary evidence of title in Jeffries emanating from them. There is a manifest equity in holding the owner of property estopped from asserting title as against one who, for value actually paid, has purchased it from one having, by the voluntary act or negligence of the owner, the apparent title with right of disposal, but with this limitation there is no hardship in holding to the rule that the right of property in chattels cannot be transferred unless on the ground of authority or title. Public policy requires that purchasers of property should be vigilant and cautious, at least to the extent of seeing that their vendors have some and the usual evidence of title, and if they are content to rest upon their declarations they may not impose the loss, which is the result of their own incautiousness or credulity, on another. The payment for or parting with value for the goods by the purchaser from the fraudulent vendee lays at the foundation of the estoppel, for if he has parted with nothing, he can lose nothing by the retaking of the goods by the original owner, and that payment must be occasioned by the acts or omissions of such owner. It is the payment that creates the estoppel, and if that is not made in reliance on the acts of the owner, the latter is not and cannot, in the nature of things, be estopped.

The order granting a new trial must be affirmed, and judgment absolute for the plaintiffs. All concur.

Order affirmed and judgment accordingly.

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## BUTTERS v. HAUGHWOUT et al.

(Supreme Court of Illinois, 1866. 42 Ill. 18, 89 Am. Dec. 401.)

BREESE, J.[75] This was an action of replevin, brought in the Cook circuit court by E. V. Haughwout and others, crockery and china ware merchants in the city of New York, against William A. Butters, an auctioneer in Chicago. The defendant is not a real party to the controversy. He stands in the attitude of a mere stakeholder. James Duncan of the dry goods house of Ubsdell, Pearson & Co., of St. Louis, is the real defendant, who had sent the goods in controversy, with some others of his own, to Butters to be sold. After the action of replevin was commenced, it was agreed between the agent of the plaintiffs and Duncan, that all of the goods sent by Duncan to Butters, should be sold by him together, and the proceeds should be divided between the plaintiffs and Duncan, in proportion to their interests. The action was to recover the possession of twenty-three casks of French china ware, and their contents, of the value of two thousand five hundred dollars.

The pleas were non cepit, non detinet, and property in James Duncan. The controversy arises on the third plea.

The jury found a verdict for the plaintiffs. A motion for a new trial being overruled and exception taken, judgment was entered on

[75] The statement of facts and part of the opinion are omitted.

the verdict, to reverse which the defendant prosecutes this writ of error. * * *

The claim of the plaintiffs in the replevin, was based upon the allegations of fraudulent representations made by one Morgan, to whom they sold the goods, and a knowledge thereof by Duncan, who received them from Morgan on account of a pre-existing debt due by Morgan to Duncan.

Duncan claimed the goods by a fair purchase, for a valuable consideration, without any notice of any fraud on the part of Morgan in obtaining the goods.

The only consideration proved, was a pre-existing debt of a large amount, due by Morgan to Duncan, and that these goods were received by Duncan on account of that indebtedness. * * *

The counsel for the defendants in error contend, that Duncan could not buy the goods in question from Morgan, the fraudulent vendee, paying nothing for them in the nature of a new consideration, but taking them merely on account of a pre-existing indebtedness, the sale having been promptly disaffirmed by the defendants, and the goods reclaimed so soon as the fraud was discovered.

Counsel admit that, as to commercial paper, such as bills of exchange and negotiable promissory notes, the holder of such, if taken in the regular course of business before due, and for a valuable consideration, is not subject to have his title questioned—that, in such case, a pre-existing debt is a valuable consideration for the transfer. But he says commercial paper, in the regular course of business, is not taken upon the title of the holder, but upon the credit given to it by the policy of the law, and although stolen, a bona fide holder will not be affected if he has no knowledge of the theft, and has acted with due caution. He insists that it is not so with lands or chattels, they being taken on the title of the vendor. But he admits that a sale of chattels, effected by fraudulent misrepresentations, may ripen into a title in the vendee so as to conclude the vendor by his acquiescence, manifested by his bringing a suit for the purchase-money, by lapse of time with knowledge of the fraud, or by a sale to a bona fide purchaser; but to be a bona fide purchaser he must purchase in ignorance of the fraud, and must actually pay a new consideration, and a pre-existing debt is not such a new consideration, although it is a valuable consideration. And he also admits that there may be circumstances which would entitle a party claiming as a bona fide purchaser to favorable consideration, when a previous indebtedness is used as the consideration, in whole or in part, for the new purchase, such as the surrender of securities, the cancellation of mortgages, and the like.

These admissions by the defendants' counsel seem to us to admit away their whole case. If a pre-existing debt be a valuable consideration for the purchase and transfer of personal property, a most important element to make a sale valid is shown, and if the transaction be fair and honest, with no knowledge of any fraud on the part of his vendor, what is wanting to vest the title in such a purchaser? If a previous indebtedness be used, in whole or in part, as the consideration for the new purchase, and that is a valuable consideration, as is admitted, is it not a question for the jury how this indebtedness was used;—was it in the surrender of securities, the cancellation of mortgages, or the like? It being admitted that a pre-existing debt is a valuable consideration for the sale of goods, in the absence of all knowledge on the part of the purchaser of any fraud on the part of his vendor, the court should, on the admission of the defendant, have instructed the jury as asked by the plaintiff in error. The instruction proceeds on the ground the goods were taken from Morgan in part payment of a pre-existing debt due from him to Duncan, that they were taken in good faith, and without any knowledge, on the part of Duncan, of any fraud in Morgan in obtaining the goods. Whether or not Duncan canceled mortgages, or surrendered securities he held against Morgan, or discharged other indebtedness in whole or in part, were facts to be inquired into by the jury. * * *

All the cases cited by defendants' counsel hold, that, if the party receiving a note parts with anything valuable, he is entitled to enforce the payment of the note, irrespective of the equities as between the original parties. But taking it on a pre-existing debt he parts with nothing, and if he fails in his title, he is in a condition no worse than he was before he took the assignment; and the same is true of the purchaser of goods, he loses nothing by the transaction, he has advanced no new consideration, and is not injured if his title does not prevail. This idea is paramount, and runs through all the cases, but is mere assumption.

A creditor who takes goods in payment, in whole or in part, of a precedent debt, in good faith, having no reason to suspect any other claim existing to the property, and having no reason to doubt his title, is lulled into security. He rests in the belief that his debt is paid, and, in that belief, foregoes all effort to seek other payment or security.

This idea, although scouted by Woodworth, Justice, in the Case of Coddington, is, we think, the ruling point in the case. Why, we ask, is not the equity of such a person as strong against another claimant as if he had paid a new consideration—had actually counted out the dollars in payment? He would be in no worse condition in the latter case than in the former, for, in either case, on failure of title, he could recover back the money paid, or the amount of the credit he had given on the pre-existing debt, or the value of the securities he had delivered up, or the mortgage on which he had caused satisfaction to be entered. This will not be denied, so that the reason given for the doctrine is more specious than sound.

In the one case, if the title of the new claimant is allowed to prevail, the party taking the goods on an antecedent debt, may lose a debt he would not have otherwise lost. In the other case, he may lose the consideration which he has paid. He is liable to equal injury in either case, and, therefore, we think it is not true to say, that, when property is taken in payment of a precedent debt, the party, if he loses it, is in no worse condition by being obliged to surrender it. At any rate, it is a matter of uncertainty that a party so receiving goods in payment of a precedent debt, is in no worse condition if they are taken from him, than he was before he received them. If he loses a security he might have obtained, he is in a worse condition. If his vendor becomes insolvent after the credit is indorsed on his note or account, or his mortgage entered as satisfied before the goods are reclaimed, he is in a worse condition.

As commercial paper is but the representative of the property of the country, and good policy requiring that the latter should circulate freely, we think, if in the one case a pre-existing debt is a valuable consideration for the assignment, so in the other, the same consideration should be available in its purchase, the element of good faith existing in both transactions. Every day's experience shows us that creditors do not usually take property in payment of a debt, certainly not when the money can be had; what difference can it make then, if a debtor, having no money, honestly transfers his chattels to his creditor to pay a debt? and why should not the creditor be secure in the acquisition, if he has acted in good faith, and is ignorant of any latent equities or prior claim? The hardship, if there be any, is on the creditor, for the reason, such transactions, however honest they may be, are more open to the charge of fraud, and more difficult to be defended against such a charge, than where money is actually paid, but in principle we can perceive no substantial difference. * * *

Judgment reversed.[76]

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[76] In Leask v. Scott, 2 Q. B. D. 376 (1877), Bramwell, L. J., said: "Practically such a consideration as is now under discussion has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. * * * If in this case the plaintiff had bought the goods out and out and then been paid part of his debt with the price, the consideration would have sufficed, if the transaction was not colorable. If the plaintiff had said, 'I cannot take this bill of lading safely as the consideration would be past, do it with the broker next door, and give me his check,' that would have been valid. Is it desirable to introduce such niceties into commercial law?"

## SLEEPER v. DAVIS.

(Supreme Court of New Hampshire, 1886. 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377.)

Replevin for goods bought from the plaintiffs by one Nellie Davis and by her sold to the defendants. Facts agreed. The plaintiffs claim to hold the goods on the ground that they were purchased with a fraudulent intent on the part of said Nellie Davis of not paying for them, which entitled the plaintiffs to rescind the sale. The officer found a portion of the goods, and delivered them to the plaintiffs. A few days after, the plaintiffs brought an action of assumpsit against Nellie Davis to recover the price of that portion of the goods not taken on the replevin writ; and judgment has been entered in this suit upon default, for the price of the goods, less the value of those taken on the replevin writ. The consideration of the sale by Nellie Davis to the defendants was an antecedent debt due from her to them. The defendants claim that the plaintiffs, by bringing the action of assumpsit and taking judgment, precluded themselves from maintaining this action. The cause is to stand for trial unless the court hold that the defendants are entitled to judgment on the above facts.

ALLEN, J. The fraudulent purchase of the goods by Nellie Davis entitled the plaintiffs to rescind the contract of sale, and recover them as their own by an action of replevin, or their value by an action of trover. The same right existed in favor of the plaintiffs against the defendants, who purchased and took the goods of the fraudulent vendee, unless the purchase was made in good faith by the defendants, relying on their vendor's apparent title, with no notice of the fraud, and for a valuable consideration paid at the time. Bradley v. Obear, 10 N. H. 477; Kingsbury v. Smith, 13 N. H. 109; Farley v. Lincoln, 51 N. H. 577, 12 Am. Rep. 182. The action of assumpsit against the vendee was brought after the replevin suit, and was for the price of the goods not replevied. Having rescinded the contract of sale, and not finding all the goods, so as to take them in replevin, the plaintiffs might have sued in trover for the conversion of the remainder. The vendee having disposed of the goods for her own benefit, the plaintiffs might waive the tort, and maintain assumpsit for the proceeds, not upon the original contract of sale, which has been rescinded, but upon the implied promise to pay for property wrongfully appropriated. Mann v. Locke, 11 N. H. 248; Smith v. Smith, 43 N. H. 536. If, by the action of assumpsit, the plaintiffs affirmed the sale to the defendants, it was only an affirmance of the sale of those goods the price of which was sought to be recovered in the suit, and did not affect the plaintiffs' right to further prosecute their suit against the defendants for the other goods taken in replevin.

The action of assumpsit was not a revocation of the rescission of the contract of sale, nor a waiver nor release of the right of action against the defendants for the goods replevied, and is not a good ground of defense to this suit.

The vendee of the goods had title and possession, and, before the contract was avoided for fraud, could make to an innocent purchaser for value a sale in which he would be protected against the claim of the first vendor. Benj. Sales, §§ 648, 649; Kingsbury v. Smith and Farley v. Lincoln, supra. The consideration for the defendants' purchase was an antecedent debt claimed to be due them from the plaintiffs' vendee, and the plaintiffs claim that the purchase, for that reason, was not one for value.

The defendants, at the time of the sale to them, paid nothing. They received the goods in satisfaction of what they had before paid, and not upon the strength of any new consideration or value then parted with. The right thus acquired was not in equity, superior to the plaintiffs' right of reclaiming the goods for fraud in the sale, and the advantage the defendants gained by their transaction could not equitably be retained against the plaintiffs. If, of the two innocent parties, the plaintiffs clothed the fraudulent vendor with title and possession of the goods, on the strength of which she could, until the contract was avoided, sell to the defendants, they do not suffer by the plaintiffs' rescission of the contract of sale and recapture of the goods; for, to the extent of the value of the goods retaken, the debt which the vendee attempted to pay to the defendants would not be discharged, and to that extent they are left in the position they were in before the transaction. By the plaintiffs' recapture of their goods the defendants lose nothing which they are entitled to retain.

In Kingsbury v. Smith, supra, the consideration for the sale of the property, of which a title was fraudulently obtained, was a debt due the purchaser, and an overcoat delivered at the time; and upon the ground that the purchaser took the property in good faith, without notice of the fraud, and that the overcoat was a sufficient consideration for the purchase, the decision was that the purchaser was protected in his claim against that of the original vendor. It was not decided that the discharge of the debt made the purchase bona fide and one for value, and there is nothing in the opinion which shows that, had the debt been the sole consideration, the decision would not have been in favor of the defrauded vendor.

In other jurisdictions it has been decided that the purchaser of goods from a fraudulent vendee cannot maintain his claim to the goods against the right of the original vendor, as that of a bona fide purchaser for value, where the consideration of his purchase is merely the discharge of an antecedent debt. Barnard v. Campbell, 58 N. Y. 73, 76, 17 Am. Rep. 208; Stevens v. Brennan, 79 N. Y.

254, 258; Fletcher v. Drath, 66 Mo. 126; Poor v. Woodburn, 25 Vt. 235; Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118. The assignee of the fraudulent vendee in insolvency, taking the assignment for the benefit of the insolvent's creditors, could not maintain his right to the goods against the demand of the original owner, who by fraud had been induced to give a title, (Farley v. Lincoln, 51 N. H. 577, 12 Am. Rep. 182; Bussing v. Rice, 2 Cush. [Mass.] 48;) nor could an assignee of the fraudulent vendee in bankruptcy retain the goods against the claim of the defrauded vendor. Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Montgomery v. Machine Works, 92 U. S. 257, 23 L. Ed. 656.

If the defendants had given their note for the price of the goods, instead of receiving them in discharge of a debt, they could not resist the plaintiffs' claim, unless they had paid the note before the plaintiffs rescinded the contract. Matson v. Melchor, 42 Mich. 477, 4 N. W. 200. If they had received the goods in pledge as collateral security for their debt, or a mortgage of them for the same purpose, the pledge and mortgage could not be upheld against the plaintiffs' claim. Poor v. Woodburn, supra. If the defendants had attached the goods upon a suit for the recovery of their debt, the attachment would be no bar to the plaintiffs' right of recovery, (Bradley v. Obear, 10 N. H. 477; Buffington v. Gerrish, 15 Mass. 156, 8 Am. Dec. 97; Wiggin v. Day, 9 Gray [Mass.] 97;) and if they had obtained judgment in their suit, and purchased the property at an execution sale, they could not maintain their right to it against the plaintiffs' claim. Devoe v. Brandt, 53 N. Y. 462, 466. If the defendants could not have maintained their right to the goods upon an attachment made to secure their debt before the rescission of the contract of sale by the plaintiffs, for reasons at least equally strong they could not receive the goods in payment of the same debt, and hold them against the plaintiffs' right of recapture in replevin. What they could not hold, taken by lawful process, they cannot claim to hold when taken voluntarily with the consent of the vendee for the same purpose.

According to the terms of the agreed case the cause must stand for trial. Case discharged.

Bingham, J., did not sit. The others concurred.[77]

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[77] In Goodwin v. Mass. Loan, etc., Co., 152 Mass. 189, 25 N. E. 100 (1890), Field, C. J., said: "Whatever may be the law in the case of a transfer of chattels in payment of a pre-existing debt, when the debt is thereby discharged we think that by the weight of authority a pledging of chattels as security for a pre-existing debt, when there is no present consideration whatever for the pledge, does not constitute the pledgee a holder for value, within the meaning of the rule we are considering. * * *" But see, contra, Kranert v. Simon, 65 Ill. 344 (1872). For a concise discussion of the question, upon principle, see Williston, Sales, § 620.

## CHAPTER III

## DESTRUCTION OF THE GOODS—RISK OF LOSS

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### DEXTER v. NORTON et al.

(Court of Appeals of New York, 1871. 47 N. Y. 62, 7 Am. Rep. 415.)

Appeal from a judgment entered upon an order of the General Term of the Supreme Court in the First Judicial District, overruling plaintiff's exceptions, and directing judgment dismissing the complaint, in accordance with ruling of the court at circuit.

This action is brought to recover damages for a breach of a contract to sell and deliver cotton. Defendants, on the 5th day of October, 1865, at the city of New York, agreed to sell and deliver to the plaintiff 607 bales of cotton, bearing certain marks and numbers, specified in the contract, at the price of forty-nine cents per pound, and fourteen bales, bearing marks and numbers, specified in the written contract, at the price of forty-three cents per pound, the cotton to be paid for on delivery. Defendants delivered to the plaintiff 460 bales of said cotton, the remaining 161 bales were accidentally destroyed by fire without fault or negligence of the defendants. Cotton rose in value after the sale, and plaintiff claimed to recover the increase on the 161 bales. The court dismissed the complaint, upon the ground that a fulfillment of the contract by the sellers had become impossible by the destruction, without their fault, of the subject-matter of the sale, and they were, therefore, excused from the obligation to perform their agreement. Plaintiff excepted.

CHURCH, Ch. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the one hundred and sixty-one bales in question by the sellers before delivery. The title therefore did not pass to the vendee, but remained in the vendor. Joyce v. Adams, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident nor even those events denominated acts of God will excuse him, and the reason given is, that he might have provided against them by his contract. Paradine v. Tone, Aleyn, 27; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349.

But there are a variety of cases where the courts have implied a condition to the contract itself, the effect of which was to relieve the party when the performance had without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. 2 Smith, Lead. Cas. 50.

The same rule has been laid down as to property: "As if A. agrees to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval, the obligation is at an end." Benj. Sales, 424. In replevin for a horse and judgment of retorno habendo, the death of the horse was held a good plea in an action upon the bond. [Carpenter v. Stevens] 12 Wend. 589. In Taylor v. Caldwell, 113 E. C. R. 824, 3 Best & Smith, 836, A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; Held, that both parties were discharged from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows:

"The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In School District v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371, the defendant had agreed to build a school-house by the 1st of May, and had it nearly completed on the 27th of April, when it was struck by lightning and burned; and it was held that he was liable in damages for the nonperformance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject-matter of the contract; and this is the rule of the civil law.

Pothier Cont. Sale, art. 4, § 1, p. 31. We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, recognize such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject-matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business we may infer did, protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property bargained without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

ALLEN, GROVER and RAPALLO, JJ., concur. PECKHAM and FOLGER, JJ., dissent.

Judgment affirmed.

## ONTARIO DECIDUOUS FRUIT GROWERS' ASS'N v. CUTTING FRUIT PACKING CO.

(Supreme Court of California, 1901. 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231.)

GRAY, C. This action was brought to recover the price of certain peaches sold and delivered under a contract in writing. The defendant set up as a defense noncompliance of plaintiff with the contract, and also a counterclaim on account of damages arising out of such noncompliance. The plaintiff had judgment, from which, and from an order denying a new trial, the defendant appeals.

The contract between the parties contains the following stipulations: "Seller has this day sold and agrees to deliver to buyer f. o. b. cars at South Cucamonga, and buyer has bought and agrees to receive from seller, the peaches, to the extent named, grown during the year 1898 on the orchard or land known and described as follows: Sundry orchards in Ontario and Cucamonga, at the prices and on the terms and conditions named." Then follow the terms, showing the grades and varieties of peaches sold, the minimum and maximum quantities of each, and the price per ton, and then the contract proceeds as follows: "Deliveries shall be made between the 20th day of July and the 1st day of September, 1898, and shall conform as far as possible to the mutual convenience of buyer and seller." Then follows a description of the fruit as to quality and size, and after that we quote again: "Payments shall be made as follows: One-half the delivery value within ten days of the date of full delivery, and one-half (the balance) of delivery value within thirty days of the date of final delivery, or the execution of all the terms of this contract by the seller." The contract is signed by the corporation plaintiff as the "seller" and the defendant corporation as the "buyer."

At the trial it was shown by oral evidence, against the objection and exception of defendant, that the "sundry orchards," spoken of in the written contract referred to and was confined to orchards belonging to the stockholders of plaintiff.

It appears that the fruit crop in the districts mentioned in the contract promised well at the date of the making of said contract, and that in an ordinary year the orchards referred to therein would have produced sufficient fruit to carry out the contract. But before it was fully grown the season turned unusually dry and hot, and hot winds impaired the quantity and quality of the fruit to such an extent that it was impossible for plaintiff to furnish, from the orchards of its stockholders in the said districts mentioned in the contract, a quantity of fruit equal to one-half of the minimum amount agreed to be furnished. Plaintiff did, however, furnish to defendant and defendant received such fruit as was grown on said orchards of the varieties and qualities described in the contract. When it was apparent that the varieties named in the contract could not be obtained from said orchards to the extent agreed upon, the defendant offered to accept "Salway" peaches in satisfaction of the contract, but the plaintiff failed to comply with this offer. "Salway" peaches were not mentioned in the contract.

The defendant places its contention for a reversal upon three grounds, as follows: First, the plaintiff could recover nothing without a full delivery of the minimum contract quantity of fruit, as such delivery was a condition precedent to the right to recover anything under the contract; second, the court erred in permitting plaintiff to explain by oral evidence what was meant by "sundry orchards"; and, third, plaintiff's refusal to furnish Salway peaches in accordance with defendant's request.

As to the first ground, we think that defendant should not be permitted to accept and retain the peaches of plaintiff, and yet refuse to pay for them. The defendant's agents had inspected the orchards of the stockholders of plaintiff, and it must have known at the time it was receiving this fruit that it was impossible to comply strictly with the contract. The rule is that, "though a contract of sale be entire, and the seller deliver only a part of the goods bargained for, yet, if the vendee retain such part, the vendor may recover the value of the part retained in an action for goods sold and delivered." Clark v. Moore, 3 Mich. 55. The acceptance and retention of a part of the goods is treated as a waiver of the condition precedent as to the delivery of the rest of the goods. And where the sale is of specific goods, and the goods perish before delivery, without the fault of the vendor, the vendee has no right of action for failure to deliver on the part of the vendor. This rule applies also where it becomes impossible to deliver a part of the property sold, as is illustrated in the English case of Howell v. Coupland, L. R. 9 Q. B. 462.

As to this case we quote from Benj. Sales, § 570, as follows: "The principle of Taylor v. Caldwell [3 Best & S. 826] was applied to a case (Howell v. Coupland, L. R. 9. Q. B. 462,) where the contract was to sell '200 tons of potatoes grown on land belonging to the defendant in Whaplode.' The potatoes were not in existence at the date of the contract, but the land, when sown, was capable in an average year of producing far more than the quantity of potatoes contracted for. There was a failure of the crop from disease, and the vendor was only able to deliver eighty tons. In an action for nondelivery of the residue, the defendant was held to be excused from further performance on the ground that the contract was for a portion of a specific crop, and therefore subject to an implied condition that the vendor should be excused if, before breach, performance became impossible from the perishing, without default on his part, of the subject-matter of the contract."

In the case at bar, the sale having been of specific varieties of fruit growing and to be grown on specific orchards, and the orchards having been so far affected by the extraordinary drought that they did not produce sufficient fruit of the varieties named to comply with the contract, the plaintiff could be compelled to perform the contract only so far as it was possible for it to do so. It could not be made to perform impossibilities, nor was it liable in damages by way of counterclaim or otherwise for a failure to comply with its contract resulting from vis major, and not attributable to any fault on the part of said plaintiff. Nor could plaintiff be compelled to substitute other peaches than those contemplated in the original contract of sale. If the sale had been of a specific lot of horses, and half of them had died before delivery, I take it that no one would contend that the vendor could be compelled to substitute other horses before he could recover for such as the vendee had already received. The vendee having accepted a part of the fruit, it should pay for it at the agreed rate, and the loss of the other fruit is the misfortune of the vendee as well as of the vendor, and neither is liable to the other on account of it. Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415. The furnishing of other peaches for those lost would be substituting a new sale, rather than substantially complying with the original contract of sale. There is nothing in Remy v. Olds (Cal.) 34 Pac. 218, 21 L. R. A. 645, in any way conflicting with the foregoing principles.

There was no error in permitting plaintiff by parol evidence to identify the subject-matter of the contract. The expression "sundry orchards in Ontario and Cucamonga" shows on its face that it was not the purpose of the contract to include all the orchards in the districts named, and it therefore became necessary to resort to oral evidence to explain what orchards were meant. Benj. Sales, § 213; Tayl. Ev. §§ 1194, 1195. Nor was there prejudicial error in permitting it to be shown by oral evidence that defendant agreed at the time the contract was signed not to hold the plaintiff bound to deliver the minimum quantity mentioned in the contract, unless that quantity was actually grown on the particular orchards embraced in the contract, because, as we have already seen, that condition could be fairly implied from the written agreement, and it could do no harm to prove by oral evidence that which was already established by the written contract.

The judgment and order should be affirmed.

Chipman and Smith, CC., concurred.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order are affirmed.[1]

## CALCUTTA & BURMAH STEAM NAV. CO., Limited, v. DE MATTOS.

## DE MATTOS v. CALCUTTA & BURMAH STEAM NAV. CO., Limited.

(Court of Queen's Bench, 1863. 32 Law J. Q. B. 322.)

Blackburn, J.[2] These cross actions arise out of the same transaction.

A special case has been stated, on the argument of which some very important and difficult questions of mercantile law were mooted and argued by Mr. Bovill for the company, and Mr. Mellish for De Mattos; but the view I take of the case makes it unnecessary to pronounce an opinion on most of these. The question which, in my view of the case decides everything, is: What was the meaning of the contract between the parties? That contract is contained in five letters set out in the case, and, being in writing, it is for the Court to construe it. The first of those letters bore date the 1st of May 1860, and the contract was finally concluded by the last, which bore date the 7th of May, 1860.

Leaving out those parts of the contract not relevant to the present dispute, and stating the terms, as they were finally agreed to, in the very words of the letters, the contract is thus expressed: "De Mattos is to supply the company with 1,000 tons of any of the first-class steam coals on the Admiralty list, obtainable at the port of shipment, the selection of the particular description to be at the company's option, delivered at Rangoon, alongside craft, steamer, floating depot, or pier, as may be directed by the company's agent at that port. Shipment to be before the 30th of June then next. The price to be 45s. per ton of 20cwt. delivered at Rangoon. Payment, one-half of invoice value by bill at three months, on handing bill of lading and policies of insurance to cover the amount, or in cash under discount at the rate of £5. per cent., at De Mattos's option. The balance by the company's Rangoon agent's drafts on the company in London, on completion of delivery at Rangoon."

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[1] Compare Anderson v. May, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642 (1892).

[2] The statement of facts and part of the opinion are omitted.

This contract having been entered into on the 7th of May, De Mattos, in furtherance of it procured a charter of the ship Waban. The company were not parties to this charter-party, nor privy to its contents. By it the freight payable to the shipowners was 40s. per ton; it was all made payable by bills in London, to be accepted by the charterer (De Mattos), part upon the shipment of the goods, but to be returned if the goods were not delivered at their destination; the residue on certificate of the due delivery. So that by the provisions of this charter-party the whole charter freight of 40s. per ton was made contingent on the right delivery at Rangoon (so that the shipowners had a right, by trans-shipment, if necessary, to carry on the goods to Rangoon for the purpose of earning this freight of 40s. per ton.), and the freight being all payable in London by the charterers, the shipowner renounced all lien for freight.

De Mattos shipped on board this vessel 1,166 tons (being more than the quantity specified in his contract, viz., 1,000 tons). He took a bill of lading for that quantity, expressing the freight "to be paid by the charterers as per charter-party;" so that the bill of lading provides that there shall be no freight payable on delivery, and consequently no lien for it as against the assignee of the bill of lading. He also effected a policy of insurance for £1,400., being somewhat above the half of the invoice value of 1,166 tons at 45s.; the precise half of the invoice value being £1,311. 15s. He transmitted the bill of lading and policy to the company, and received payment under discount of the £1,311. 15s. It is not explained in the case how it came that De Mattos shipped 1,166 tons instead of 1,000 tons; but as no objection was made, I presume that it had been so arranged between the parties; at all events, the Court having power to draw inferences of fact, I draw the inference that the parties agreed that the 166 tons extra were shipped on similar terms to those relating to the 1,000 tons.

These facts are sufficient to raise the question on the solution of which I think this case depends, viz., What was the effect of the contract as regards the property in the goods and the right to the price, from the time of the handing over the shipping documents and paying half of the invoice value? There is no rule of law to prevent the parties, in cases like the present, from making whatever bargain they please. If they use the words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them on the terms, that when shipped they shall be the consignee's property, and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is, in such cases, at an end when he has delivered the goods to the carrier, and, if the goods perish in the carrier's hands, the vendor is discharged, and the purchaser is bound to pay him the price. See Dunlop v. Lambert, 6 Cl. & Fin. 600. If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual; in such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. See per Lord Cottenham, C., delivering judgment in the House of Lords in Dunlop v. Lambert, 6 Cl. & Fin. 621.

But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that, when he has done so, he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination; and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser, as owner, as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving; just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall; but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall. Where the contract is of this kind, the position of the vendor and purchaser, in case the goods do not arrive, is analogous to that of freighter and shipowner, in the ordinary contract of carriage on board a ship, in case the goods are prevented from arriving by one of the excepted perils. The shipowner is not bound to carry and deliver at all events; but, though he is excused if prevented by the excepted perils, yet no freight is earned or payable unless the goods are delivered. In the case of freight, also, the question often arises, whether a payment made at the port of shipment is an advance of part of the freight, returnable if the goods are not delivered and freight earned, or is an absolute payment, leaving only the balance contingent on the safe delivery of the goods,—a question very analogous to one that arises on the present contract. See the cases as to pre-payment of freight collected in M'Lachlan on Shipping, p. 443.

The parties in the present case have not, in express terms, declared their intention as to the time when the property in the coals was to be transferred from De Mattos, who was to supply the coals, to the company; and we are left to collect the intention from the various stipulations in the contract. It is clear that the coals are to be shipped in this country, on board a vessel to be engaged by De Mattos, to be insured, and the policy of insurance and the bill of lading and invoice to be handed over to the company. As soon as De Mattos, in pursuance of these stipulations, gave the company the policy and bill of lading, he irrevocably appropriated to this contract the goods which were thus shipped, insured, and put under the control of the company. After this, he could never have been required, nor would he have had the right, to ship another cargo for the company; so that from that time that, which had originally been an agreement to supply any coals answering the description, became an agreement relating to those coals only, just as much as if the coals had been specified from the first.

Sir Cresswell Cresswell, in delivering an elaborate judgment of the Privy Council in Gilmour v. Supple, 11 Moo. P. C. 566, says: "By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties." "Various circumstances," he adds, "have been treated by our Courts as sufficiently indicating such contrary intention." I think this a very accurate statement of the law; and I think, therefore, that in construing this contract, the prima facie construction is, that the parties intended that the property in the coals vested in the company, and the right to the price in De Mattos, as soon as it came to relate to specific ascertained goods; that is, on the handing over the documents; and the inquiry must be, whether there is any sufficient indication in the contract of a contrary intention. As to one-half of the price, the balance, as it is called in the letter forming the contract, the intention that it should only be paid "on completion of delivery at Rangoon," seems to me as clearly declared as words could possibly declare it; and consequently, I think, as to that half of the price no right vested in De Mattos, unless and until there was a complete delivery at Rangoon.

But, consistently with this, there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos; so as in effect to make the goods be at the risk of the company, though half the price was at the risk of De Mattos: so that the goods were sold and delivered, though the payment of half the price was contingent on the delivery. And this, I think, is the true legal construction of the contract. There are, undoubtedly, some expressions in the letters, which may plausibly be said to indicate an intention, that the whole risk shall be on De Mattos up to the time of the contemplated delivery at Rangoon. The coals are to be delivered at Rangoon; the whole price is expressed to be "45s. per ton of 20cwt. delivered at Rangoon."

I fully admit, that the argument, that these words imply an undertaking that the coals shall be delivered at Rangoon, or, at least, that nothing shall be paid except for such coals as are delivered at Rangoon, is a very forcible one. But then, we must look at the whole contract. We find that the coals when shipped are to be insured, and the policy of insurance is to be handed over to the company. It is consistent with this, that the policy was to be handed over to the company, only to be a collateral security for an advance; but it is more natural that it should be given to them, because the risk which the policy covered was to be theirs. The bill of lading is handed to them so as to give them the actual, de facto, dominion over the goods and to confer upon them the power of giving to a third party, by a sale or pledge of that bill, what that third person would believe to be a rightful dominion over the goods. This, too, is consistent with the bill of lading being delivered to the company merely with a view to give them an effectual security for an advance; but, as before, I think the more natural solution of it is, that it was given to them because, the property being theirs, they were entitled to the control of the goods.

It is very true that the company (a steam navigation company, who wanted coals for their own use) probably did not contemplate selling the goods to third parties, and therefore the argument as to the intention of the parties, arising from the possession of the bill of lading, is not so strong as if the purchaser had been an ordinary merchant, who purchased the coals meaning to sell them again, and who, therefore, presumably stipulated for the bill of lading in order that he might be able, without breach of contract or bad faith, to sell them again; but though the company probably did not mean to sell this cargo before it arrived at Rangoon, they had, from the time the bill of lading was put into their hands, power to do so if they thought fit; and it seems to me that the fact, that the contract contains a stipulation for that power in favour of the purchasers, is very strong to shew, that the property, and consequently the risk, was intended to be in them from the time they received the bill of lading. * * *

If the true construction of the contract be that which I put upon it, there is no difficulty in disposing of the case. The company are not entitled to recover back any portion of the money paid to De Mattos: for it was to be his absolutely on handing over the policy and bill of lading; nor are they entitled to maintain any action against him for not causing the goods to be delivered at Rangoon: for he had not entered into any contract to the effect that he would at all events cause them to be delivered there. They, therefore, fail entirely in their action against him. De Mattos, on the other hand, is not entitled to recover from the company any part of the balance of the price which by the contract was made payable by the drafts of the company's Rangoon agents "on completion of the delivery at Rangoon:" for no portion of the coals ever was delivered at Rangoon according to the contract. It is true that 850 tons were tendered there to the company, who might have had them, if they would have paid to the captain of the Alfred Lamont 45s. per ton in discharge of his claim for freight; and it is true also that they refused to pay this sum (as they had a full right to refuse); and that when the captain chose to sell the coals by auction they purchase them, paying 25s. per ton. The effect of this was, that these coals actually did come into their possession at Rangoon; but the delivery, on the completion of which the balance of the price was by the contract to become payable, was a delivery under the contract "at Rangoon, alongside craft, steamer, floating depot, or pier," without any further payment being made. There never was any such delivery.

The observations of Lord Brougham in delivering the judgment of the Privy Council in Logan v. Le Mesurier, 6 Moo. P. C. 132, seem to me much in point on this part of the case. If the conduct of the company's agents at Rangoon had been mala fide, and such as to prevent the delivery according to the contract, or if it had amounted to a waiver of the fulfilment of the condition, then no doubt, as against them, the condition might have been considered as fulfilled, and the balance would have been payable. We have power to draw inferences of fact; but I think there is nothing stated in the case, that would justify us in putting such a construction on the conduct of the company's agents at Rangoon, or in drawing such an inference of fact. In my opinion, the second question in the case must be answered in favour of the company.

There remains only one other point to consider. The company purchased the 850 tons from the captain of the Alfred Lamont. It was argued with great force by Mr. Mellish, that the captain of the Alfred Lamont had no right to sell those coals, and consequently that the company purchasing them, with notice of the facts (if notice was material), were guilty of a conversion, and liable in trover to the true owner of the goods. I am not prepared to dissent from this view of the case, but it is not necessary to decide this point. If it were necessary, I should wish to consider the grounds of my opinion with some care, and state them at length, as some of the points involved are of great importance and great difficulty. But if I am right in the construction I have put upon the contract, the goods were not at the time of the sale the property of De Mattos, and he, at all events, can maintain no action for their conversion.

The result is, that in each of the cross-actions there should, in my opinion, be judgment for the defendants.

In the action by the company against De Mattos, judgment for De Mattos.

In the action by De Mattos against the company, judgment for the company.[3]

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[3] Opinions were also delivered by Wightman, J., and Cockburn, C. J., both of whom held that, though the property in the coals passed to the company on the shipment and delivery of the shipping documents, De Mattos was bound to deliver them at Rangoon, and, having failed to do so, he was liable to refund the half of the purchase money which he had received and to pay any damages arising from the nondelivery. Mellor, J., concurred in the opinion of Blackburn, J.; but the court being evenly divided, he, being junior

## McNEAL v. BRAUN.

(Court of Errors and Appeals of New Jersey, 1891. 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441.)

DEPUE, J.[4] Braun, the plaintiff below, in 1883, was a wholesale dealer in coal at Philadelphia. McNeal, who is now plaintiff in error, was engaged in the foundry business at Burlington, in this state. On the 14th of June, 1883, McNeal ordered from the plaintiff 98 tons of lump and steamboat coal, to be delivered at Burlington, at $4.10 a ton, delivered. The coal was shipped in a barge called "The Wayward" on the 21st of June. The barge arrived at Burlington on the 23d, but it was not until the 26th that she was laid along-side of the wharf. On the afternoon of that day the defendant's foreman notified the captain of the barge to place it along-side of the defendant's wharf. In order that the boat might be so placed that the steam-hoist could be used for unloading, the boat was separated into its two parts. The forward part was made fast to the wharf, being separated from the wharf by a float about three feet wide, furnished by the defendant, for the purpose of steadying the boat in a position that was necessary for the working of the iron buckets on the steam elevator. The after-part of the boat was moored on the river side of the other part. When the forward compartment of the boat was placed in position the buckets of the hoisting works were lowered upon the boat, and preparations were made by the defendant's servants for unloading the coal. They completed their preparations about 10 minutes before 6 o'clock, and stopped work at 6, the usual time for quitting work. During the night this compartment of the boat sank, with the coal that was in it. The compartment that was moored in the river remained in safety. After the sinking of the forward compartment, the coal that was in the other compartment was unloaded and taken by the defendant.

The suit was for the whole quantity of coal sold, but the controversy at the trial was with respect to the coal that was sunk and entirely lost. Under the charge of the court the jury found for the plaintiff the full contract price for the entire shipment. The order for the coal was given by the defendant to Arkless, the agent of the plaintiff, at the plaintiff's place of business in Philadelphia. The order was for a cargo of coal of an approved size and quality. The coal was not at that time separated from the plaintiff's stock on hand. The price to be paid was $4.10 per ton, delivered at Burlington. The carrier was selected by the plaintiff, and he took from him a bill of

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judge, withdrew his opinion. Judgment was entered in the first action, for the plaintiffs; in the second action, for the defendants. In the Exchequer Chamber (33 L. J. Q. B. 214), the judgment in the first action was reversed; in the second action, affirmed.

[4] Part of the opinion is omitted.

lading, signed by the master in these words: "Shipped by Charles Braun, in good order, on board the boat called 'Wayward,' now lying at Philadelphia, and bound for Burlington, N. J., ninety-eight tons of Thomas Lehigh coal, which I promise to deliver at the aforesaid port of Burlington in like good order, the dangers of the seas only excepted, unto A. H. McNeal, or ——— assigns, he or they paying freight for the same at the rate of twenty one-hundredths dollars per ton. * * *

25 tons lump.
73 tons steam-boat. Captain to tend guy.
—
98"

The contract price of $4.10 a ton was the price of the coal delivered at Burlington. If the defendant paid freight pursuant to the direction in the bill of lading, the freight paid was to be deducted from the contract price.

Responsibility for loss in transportation, in carriage by sea, has occasioned considerable discussion in the English courts. The rules on this subject are stated by Lord Cottenham in Dunlop v. Lambert, 6 Clark & F. 600–621, and by the court of queen's bench and the exchequer chamber in Navigation Co. v. De Mattos, 32 Law J. Q. B. 332, 33 Law J. Q. B. 214; and particularly by Mr. Justice Blackburn, whose opinion in that case is quoted at considerable length in 1 Benj. Sales, (Corbin's Ed.) § 503, and more fully in Blackb. Sales, (Blackstone Ed.) 234. It is sometimes stated as a general rule that delivery to the carrier is delivery to the consignee, and that the goods are to be carried to their destination at his risk. But an examination of the decisions to that effect will show that this doctrine prevails only where the contract of sale, as between the consignor and consignee, was concluded at the place of shipment, and the undertaking to ship was collateral to the contract of sale, as in Tregellès v. Sewell, 7 Hurl. & N. 573. It will also be found that the rule uniformly adopted in the line of decisions is that the risk of loss in transportation depends upon the nature of the transaction, the terms of the contract, and the intention of the parties. * * *

It was undisputed in the case now before the court, and in fact was conceded by the plaintiff's counsel, that delivery of the coal by the plaintiff at Burlington, at his own expense, was a material term in the contract of sale. Under a contract of this sort, delivery of the coal on board the barge was delivery to the master, as the plaintiff's bailee or agent, to perform for him the act of delivery in execution of his contract. 1 Benj. Sales, (Corbin's Ed.) § 556. Meanwhile, and until delivery was consummated in such a manner as to be effectual as between vendor and purchaser, the coal was at the plaintiffs' risk.

On the main issue, which the learned judge declared to be the question, whose loss was the coal which sank? his instruction was that this issue would depend upon whether the sale had been completed before the loss occurred; that where parties have bargained, the one that he will sell and the other that he will buy, the duty rests upon the seller to deliver the article in pursuance of the agreement he has made, and that to complete the sale there must be an acceptance by the purchaser of the article which he purchased, in accordance with that agreement; that when that has been done "the sale is completed, and any loss after that time falls upon the man who bought. I mean, any loss which is the result of no wrongful or intentional negligence of the parties."

The court also instructed the jury that, if there was an acceptance by the defendant, then the position of the captain became changed, and his duty as the agent of the plaintiff was at an end; and this question was left to the jury upon the acts and conduct of the defendant's servants before they stopped work that night, with the instruction that if the jury should determine from the testimony "that the defendant or his employés so acted that they recognized that that coal was there at their disposal, under their dominion, within their power, and that they so acted as to show that they were dealing with it as if it were McNeal's, from those acts you may determine that there was an acceptance of the coal, as being the coal which had been bought under that bargain."

The transaction between the parties was an order for a certain quantity of coal, part lump coal and part steam-boat coal, of an approved quality. It was, in effect, a contract of sale by sample. On such a sale of goods, it is a condition implied by law that the buyer shall have a fair opportunity, by examining the goods, to satisfy himself that they are in accordance with the contract. 2 Benj. Sales (Corbin's Ed.) §§ 910, 1025, 1042; Isherwood v. Whitmore, 11 Mees. & W. 347; Startup v. McDonald, 6 Man. & G. 593; Croninger v. Crocker, 62 N. Y. 152. And under a shipment of goods by a carrier the consignee is entitled to inspect and examine the goods, to ascertain whether they correspond with the invoice, and to a reasonable time within which to receive and remove the goods. For that purpose a reasonable time within usual business hours must be allowed, and during that period the liability of the carrier as carrier remains undischarged. Bradstreet v. Heron, Abb. Adm. 209, 214; Manufacturing Co. v. The Tangier, 1 Cliff. 396, Fed. Cas. No. 12,266; Dibble v. Morgan, 1 Woods, 406, Fed. Cas. No. 3,881; The Tybee, 1 Woods, 358–363, Fed. Cas. No. 14,304; The Iddo Kimball, 8 Ben. 297, Fed. Cas. No. 7,000; 5 Myer, Fed. Dec. "Carriers," §§ 802, 803, 846, 852, 1008; The Eddy, 5 Wall. 481–493, 18 L. Ed. 486; Price v. Powell, 3 N. Y. 322; Dunham v. Railroad Co., 46 Hun (N. Y.) 245; Miller v. Navigation Co., 10 N. Y. 431; Hedges v. Railroad Co., 6 Rob. (N. Y.) 119, reversed in court of appeals, but not on this point, 49 N. Y. 223; Moses v. Railroad Co., 32 N. H. 523, 64 Am. Dec.

381; Graves v. Steam-Boat Co., 38 Conn. 143–152, 9 Am. Rep. 369; Richardson v. Goddard, 23 How. 28–39, 16 L. Ed. 412; Bourne v. Gatliffe, 3 Man. & G. 643–687, 11 Clark & F. 45–70; 3 Lewis, Ann. R. & Corp. R. 54, note to Railroad Co. v. Ludden, (Ala.) reported in 7 South. 471.

The acts done by the defendant's servants before they quit work were of a two-fold character: First. In directing the barge to be laid along-side of the wharf for unloading. The captain made the boat fast to the wharf, and remained in charge during the night. The designation by the defendant of his wharf as the place for unloading was an act in performance of the defendant's duty, as consignee, to provide a place for the discharge of the cargo. Second. In the preparations for unloading. The barge was laid along-side the float about 10 minutes before 6. The buckets were lowered down upon the barge, and possibly a small quantity of coal was unloaded. The hands quit work at 6, and replaced the buckets on the wharf. In these acts there was no evidence of an acceptance of the entire cargo, nor of a discharge of the carrier from his responsibility. Under the rules of law I have stated, the defendant was entitled to a reasonable opportunity to unload the entire cargo for examination to ascertain whether the coal corresponded with his order, and had arrived in good condition. By law he was secured these rights without discharging the liability of the carrier. Even if the goods had been accepted so as to pass title as between vendor and purchaser, the defendant, under the plaintiff's undertaking to deliver them at Burlington, still had a right to a reasonable time to unload them under the plaintiff's contract to transport and deliver the goods. * * *

Judgment reversed.

## MARTINEAU et al. v. KITCHING.

(Court of Queen's Bench, 1872. L. R. 7 Q. B. 436.)

Action to recover the price of sugars sold by plaintiffs to defendant.

The plaintiffs, sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or "titlers" each, the terms always being "Prompt at one month; goods at seller's risk for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on the plaintiffs' premises, and were from time to time fetched away by the purchasers or their subvendees, being weighed on their removal, each titler weighing from thirty-eight to forty-two pounds. If the whole of the lots contained in one sale-note had not (which was frequently the case) been taken away on the "prompt" day payment was made by the purchaser (by bill or cash) at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared.

The defendant, who was an old customer of the plaintiffs, had bought four fillings, consisting of specific titlers, each marked on the above terms, and had paid the approximate price of the four lots, and had fetched some of each lot away. A fire occurred on the plaintiffs' premises after the expiration of the two months from the dates of sale to the defendant, destroying the whole contents of the warehouses. At the time of the fire the plaintiffs had floating policies of insurance which covered goods on the premises "sold and paid for, but not removed;" but they had no agreement or understanding with their customers as to any insurance; and the amount insured, which the plaintiffs received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers undelivered which they had sold to the defendant.[5]

Blackburn, J. I am also of opinion that our judgment must be in favour of the plaintiffs. The case arises in this way. [The learned judge referred to par. 21, and stated the facts.] The difficulty which is raised is, that these goods had perished before they were actually weighed; and two points were made by Mr. Brown; he contended that because they had not been weighed the property had not passed, and that it therefore followed, as an inexonerable rule of law, that they were not to be paid for, because they were still the property of the plaintiffs. This, however, I do not think is the correct way of putting the case, and I do not think that we need decide whether the property passed or not. As a general rule, res perit domino, the old civil law maxim, is a maxim of our law; and when you can shew that the property passed the risk of the loss, prima facie, is in the person in whom the property is. If, on the other hand, you go beyond that, and shew that the risk attached to the one person or the other, it is a very strong argument for shewing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other.

In the present case I think all that is necessary to decide is, that the risk was not in the sellers. When the first month had elapsed, and payment had been made, still the buyers had, from their express stipulation, a right to have the goods remain a month at the refiners' warehouse at the refiners' risk. Let us suppose that the refiners had become bankrupt. If in consequence of the risk being in the refiners, which by this stipulation it clearly would be during the two months, the property was still in the refiners, their assignees in bankruptcy would take the entire property, and the buyers, who had paid the approximate price, would be obliged to come in and prove, and get so many shillings in the pound as they might be able to prove for. That would be a monstrous hardship, and in such a case as that I should be very much inclined to struggle very hard to find any legal reason for saying that, though the risk remained in the sellers, yet the property had passed to the buyers as soon as they had made the payment. If the question arose in such a case as that, I am rather inclined to think it would be necessary to look carefully into Simmons v. Swift, 5 B. & C. 857, and some other cases, to see if one could decide that the property had passed. But in this case that does not arise; the second of the two months had elapsed, during which the stipulation was that the goods were to be at the sellers' risk. I think expressio unius est exclusio alterius. I cannot construe that stipulation, except as implying that at the expiration of the two months the goods are to be at the buyer's risk. That construction would be greatly fortified, if it required fortification, by the fact that at the end of the two months the sellers did send a note to remind the buyer that the goods are at his risk; and this being a stipulation between two parties, who are both sui juris, that they are to be at the buyer's risk after the two months, the question is, is that effectual at law?

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[5] This statement of the facts is taken from the headnote. Part of the opinion is omitted.

Mr. Brown's argument was, that the goods must be at the sellers' risk, because, as he contended, the property had not passed to the buyer. I have already intimated that, if it were necessary, I should consider very long before I said that. However, assume that it had not passed. If the agreement between the parties was, "I contract that when you pay the price I will deliver the goods to you, but the property shall not be yours, they shall still be my property so that I may have dominion over them; but though they shall not be yours, I stipulate and agree that if I keep them beyond the month the risk shall be upon you;" and then the goods perish; to say that the buyer could then set up this defence and say, 'Although I stipulated that the risk should be mine, yet, inasmuch as an accident has happened which has destroyed them, I will have no part of that risk, but will throw it entirely upon you because the property did not pass to me," is a proposition which stated in that way, appears to be absolutely a a reductio ad absurdum; and that is really what the argument amounts to. If the parties have stipulated that, if after the two months the goods remain in the sellers' warehouse, they shall, nevertheless, remain there at the buyer's risk, it would be a manifest absurdity to say that he is not to pay for them; and I think the case of Castle v. Playford, Law Rep. 7 Ex. 98, is a clear authority of the Court of Exchequer Chamber, that where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not. The parties here have by their express stipulation impliedly said, after the two months the goods shall be at the risk of the buyer, consequently it is the buyer who must bear the loss.

Then Mr. Brown said, "But how can the buyer pay when he was to pay at 47s. per cwt., and the goods have never been weighed, and therefore it would never be known with certain precision how many cwt. there were?" I answer to that, in the first place, that the point is concluded by the authority of Alexander v. Gardner, 1 Bing. N. C. 671, Turley v. Bates, 2 H. & C. 200; 33 L. J. (Ex.) 43, and the recent case of Castle v. Playford, Law Rep. 7 Ex. 98 in the Exchequer Chamber, which all go to shew that where the price is not ascertained and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as you can.

There is another reason which in this case would clearly apply—the delay in weighing is quite as much the fault of the purchaser as of the sellers. When the prompt day comes the sellers have a right to require that the goods should be weighed at once, so as to ascertain the price, and to have it paid to the last farthing. It may be for the mutual convenience of both parties; but still it is the buyer, in effect, who requests that, as he is going to leave them longer, the weighing should be postponed for a time. Therefore it is in consequence of his delay that the weighing does not take place. Now by the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being perfecta emptio, whenever that was occasioned by one of the parties being in mora, and it was his default, though the emptio is not perfecta, yet if it is clearly shewn that the party was in mora, he shall have the risk just as if the emptio was perfecta. That is perfectly good sense and justice, though it is not necessary to the decision of the present case, that, when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass, even if there were no express stipulation about risk, yet because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed. The inclination of my opinion is, as I have said, that the property is in the purchaser, but we need not decide that at all to-day, and it might require some consideration to see how far the case of Simmons v. Swift, 5 B. & C. 857, really governs the case. * * *

Judgment for the plaintiffs.[6]

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[6] Concurring opinions were delivered by Cockburn, C. J., and Lush and Quain, JJ.

## BURNLEY v. TUFTS.

(Supreme Court of Mississippi, 1889. 66 Miss. 48, 5 South. 627, 14 Am. St. Rep. 540.)

Appeal from Circuit Court, Copiah County; J. T. Wharton, Judge.

The appellant, M. D. Burnley, bought of the appellee, James W. Tufts, a soda fount, which was to be paid for by the month, each of said payments being evidenced by the following promise in writing, one given for each month:

"10.00. Hazlehurst, Miss., June 5, 1885.

"For value received ——— after date I promise to pay to the order of James W. Tufts ten dollars, with interest, 6 per cent. The consideration of this and other notes is the following described soda-water apparatus: [Here follows description of apparatus.]

"Nevertheless it is understood and agreed by and between me and the said James W. Tufts that the title to the above-mentioned property does not pass to me, and that until all said notes are paid the title to the aforesaid property shall remain in said James W. Tufts, who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law, to enter and retake, and may enter and retake immediate possession of said property wherever it may be, and remove the same. Payable at the Merchants' and Planters' Bank, Hazlehurst, Miss. M. D. Burnley."

Burnley paid several of these notes, and his store, including the soda-water apparatus, was burned, and he refused to pay the remaining notes as they became due. Whereupon Tufts brought suit to enforce the payment of said remaining notes, and recovered judgment, from which Burnley appealed.

COOPER, J. Burnley unconditionally and absolutely promised to pay a certain sum for the property the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the notes last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether by the contract he has made his promise is absolute or conditional. The contract made was a lawful one, and as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do. Manufacturing Co. v. Cole, 4 Lea (Tenn.) 439, 40 Am. Rep. 20; Keitt v. Counts, 15 S. C. 493.

The judgment is affirmed.[7]

## FARMERS' & MECHANICS' BANK v. LOGAN.

(Court of Appeals of New York, 1878. 74 N. Y. 568.)

See ante, p. 156, for a report of this case.[8]

## McCONIHE v. NEW YORK & E. R. CO.

(Court of Appeals of New York, 1859. 20 N. Y. 495, 75 Am. Dec. 420.)

Appeal from the Supreme Court.

Action to recover damages upon a contract made between Mallory, the plaintiff's assignor, and the defendant, in December, 1849, by which Mallory was to furnish materials and build fifteen lumber cars for the defendant, for four hundred and seventy-five dollars per car, to be paid for in six months from the average delivery. The contract was subsequently so modified that the company agreed to furnish for the cars the iron boxes of a peculiar model manufactured by the company, the expense of the boxes to be taken from the price of the cars. One four-wheel car was to be completed in thirty days, and one on each day thereafter till the whole number should be completed. Mallory commenced the work immediately, and at great expense selected and purchased the materials (except the boxes) expressly for the cars. Mallory set up seven of the cars and had the work ready to set up the others, and those set up were completed as far as it was possible without the boxes, which the company neglected to furnish. The company did not manufacture the boxes, but they were and could be made only by one Brandt, and he was in the employment of the defendant. Had the company furnished the boxes all the cars could have been completed by the 1st of March, 1850, but in fact were not. The labor as far as proceeded with was performed at great inconvenience, in consequence of the boxes not having been furnished. Mallory expended for materials for the cars, and in labor upon their construction, &c., the sum of $2,159.54. He was unable to obtain insurance upon the materials and property. From the 1st of March, 1850, to the 18th May following, the cars remained in that condition, while Mallory was repeatedly urging the company to furnish the boxes. On the 18th of May, 1850, without any carelessness on the part of Mallory, all the cars and materials, except the iron, were consumed by fire, and the irons were materially injured. After the fire Mallory used such portion of the iron as was available, in making other cars for the company. Mallory was prevented from completing the special contract by the failure of the defendant to furnish the boxes as agreed by it. No specific damages for not furnishing the boxes were proved. Mallory, before the commencement of the action, transferred the claim to the plaintiff.

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[7] Compare J. M. Arthur & Co. v. Blackman (C. C.) 63 Fed. 536 (1894). In Hollenberg Music Co. v. Barron, 100 Ark. 403, 140 S. W. 582, 36 L. R. A. (N. S.) 594 (1911), it was held that the destruction of goods which had been retaken by the seller because of the buyer's default did not relieve the buyer from the obligation to pay the balance of the price.

[8] And see, further, as to risk of loss where goods are shipped under a bill of lading, Williston, Sales, § 305.

Upon the trial at the circuit the judge directed the jury to render a verdict for the plaintiff for $2,159.54, subject to the opinion of the court at general term, with liberty to the court to render judgment for either party, and if for the plaintiff, then for such sum as the plaintiff might be entitled to recover on the proof in the case. The cause was heard at the general term in the third district, where the facts were found as above stated, and judgment was given thereon for the defendant, from which the plaintiff appealed to this court.

GROVER, J. The court at General Term found the fact that Mallory would have completed the cars had he not been prevented from so doing by the failure of the company to furnish the boxes therefor, according to their agreement. Had this been a contract for work and labor to be performed by Mallory for the defendant, and he had been prevented from completing the contract by a failure of the defendant to perform on its part, he would have been entitled to recover for what he had done under the contract. Koon v. Greenman, 7 Wend. 121; Jones v. Judd, 4 N. Y. 412.

That is not this case. Mallory agreed to build for the defendant fifteen lumber cars, from materials to be furnished by him, except the boxes, which the defendant agreed to furnish, and the expense of which was to be deducted from the price of the cars. This was in effect an agreement for the sale of the cars, thereafter to be constructed by Mallory, to the defendant, and did not vest any property in the defendant until the cars were completed and delivered. Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55. In that case the authorities are cited and very ably reviewed, and it is unnecessary again to examine them upon this proposition. It then follows that the cars set up, and materials furnished for those not set up, were the property of Mallory at the time of their destruction by the fire. The rule is that the party in whom the title to property is vested must bear the loss in case of destruction by accident.

This rule is not questioned by the appellant, and it is unnecessary to cite the cases establishing it. The defendant cannot be held liable to the plaintiff for the value of the property destroyed upon the ground that the title had been transferred by Mallory to the company. The ground of liability of the defendant, for the property destroyed, if any, is that the failure to furnish the boxes according to the agreement prevented Mallory from completing and delivering the cars, and rendered it necessary for him to keep the property on hand until it was destroyed by the fire. But this was not the necessary consequence of the failure to deliver the boxes. Mallory might have rescinded the contract and proceeded at once for his damages. The cars and materials would have remained his property and he could have made any use of them he chose. He could have recovered from the defendant the contract price for the cars, deducting therefrom what it would have cost to complete them, and the value of the materials provided for the cars in the condition they then were. But Mallory was not obliged to take this course. He could insist upon completing the cars, and the defendant could not object to the delay in the delivery so long as that delay was occasioned by the neglect of the company to comply with the agreement on their part.

The plaintiff in this case had not put an end to the contract. The court find that he repeatedly called upon the company to furnish the boxes up to the time of the fire. The contract continued in full force between the parties to that time. The fire was accidental and had no connection with the defendant's breach of the contract; they are, therefore, not responsible therefor. Had the defendant delivered the boxes on the 1st of May preceding the fire, and had Mallory proceeded to finish the cars pursuant to the contract, and while so proceeding the fire had occurred, I presume no one would have insisted that the defendant was liable for the loss. I do not see that this case differs in a legal view from the one supposed. Mallory was calling upon the company for the boxes to enable him to complete the cars, electing to continue the contract in force. This disposes of the substantial rights of the parties.

The fact is found that no specific damages were proved to have resulted from the delay of the company in delivering the boxes. The plaintiff proved, and the fact is found, that the defendant violated its contract. The plaintiff was, therefore, entitled to nominal damages. Judgment should have been given therefor for the plaintiff. No important right is affected by the judgment. The plaintiff, had judgment been given for him for a nominal sum, would still have been subjected to costs. The verdict was subject to the opinion of the court. This court should give such judgment as the Supreme Court ought to have given. I think this a proper case for the application of the maxim that the law does not regard trifles, and that the judgment should be affirmed.

SELDEN, J., expressed no opinion; all the other Judges concurring.

Judgment affirmed.

# CHAPTER IV

# OBLIGATIONS OF SELLER AND BUYER

## SECTION 1.—EXPRESS WARRANTIES

### WILLISTON ON SALES.

§ 195. Early Law of Warranty.—The law of warranty is older by a century than special assumpsit, and the action upon the case on a warranty was one of the bases upon which the law of assumpsit seems to have been built. The action on a warranty was regarded as an action of deceit, and the words "warrantizando vendidit" seem to have been necessary to make a good count as the words "super se assumpsit" later were in the action of assumpsit. The action was thus conceived of at the outset as an action of tort.[1] This is, of course, also true of the action of assumpsit; but it was not long before assumpsit came to be regarded, as it is regarded to-day, as distinguished from tort and rather to be classed in its essential nature with covenant than with trespass on the case. But the right of action on a warranty was not regarded at once as similar in its nature to assumpsit. It was, indeed, not until 1778 that the first reported decision occurs of an action on a warranty brought in assumpsit,[2] though from the language of the court in that case it appears that the practice of declaring in assumpsit had been common for some years before. It is probable that to-day most persons instinctively think of a warranty as a contract or promise; but it is believed that the original character of the action cannot safely be lost sight of, and that the seller's liability upon a warranty may sound in tort as well as in contract.

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[1] Ames History of Assumpsit, 2 Harv. Law Rev. 1, 8: "Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty, Fitz. Ab. Monst. de Faits, pl. 160 (1383), the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty, but "non allocatur, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing. Moor v. Russell, Skin. 104; s. c. 2 Show. 284. How remote the action was from an action of contract appears plainly from a remark of Choke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was by deed, I shall have an action of covenant." Y. B. 11 Edw. IV, 6, pl. 11. That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge, and Brian, C. J., agreed, although Littleton, J., inclined to the opposite view, that if a servant warranted goods which he sold for his master, that no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is properly a promise to act or forbear in the future. But the action under discussion must be, as Choke, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come."

[2] Stuart v. Wilkins, 1 Doug. 18 (1778).

## CHANDELOR v. LOPUS.

(Exchequer Chamber, 1625. Cro. Jac. 4.)

Action upon the case: Whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone, which he affirmed to Lopus to be a bezar-stone, and sold it to him for one hundred pounds; ubi revera, it was not a bezar-stone. The defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the king's bench.

But error was thereof brought in the exchequer chamber; because the declaration contains not matter sufficient to charge the defendant, viz. that he warranted it to be a bezar-stone or that he knew that it was not a bezar-stone; for it may be he himself was ignorant whether it were a bezar-stone or not.

And all the justices and barons (except ANDERSON) held, that for this cause it was error. For the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action. And although he knew it to be no bezar-stone, it is not material. For every one, in selling his wares, will affirm that his wares are good, or the horse which he sells is sound: yet if he does not warrant them to be so, it is no cause of action. And the warranty ought to be made at the same time of the sale. Fitz. Nat. Brev. 94, c. & 98, b; 5 Hen. 7, pl. 41; 9 Hen. 6, pl. 53; 12 Hen. 4, pl. 1; 42 Ass. 8; 7 Hen. 4, pl. 15. Wherefore, forasmuch as no warranty is alleged, they held the declaration to be ill.

ANDERSON to the contrary; for the deceit in selling it as a bezar, whereas it was not so, is cause of action. But notwithstanding it was adjudged to be no cause, and the judgment was reversed.

## CROSS v. GARDNER.

(Court of King's Bench, 1689. 1 Show. 68.)

Case. The declaration states that there was a colloquium between the plaintiff and defendant, concerning certain oxen in the defendant's possession and sale of them; that the defendant did then and there affirm them to be his own; that the plaintiff ratione inde, did buy them and gave so much; that in fact the oxen were the property of J. S. and he seized and took them.

On the general issue and verdict for the plaintiff, it was moved in arrest of judgment, that the declaration is ill, for here is no warranty. An affirmance of right will not amount to it; for it ought to be warrantizando vendidit; nor is here any deceit, for it is not said, "knowing them to be none of his," and he might come to their possession as executor, or they might be like his own, and in the night his own removed, and these put in their places, and so he is not guilty of any falsity.

E contra urged, that here is a colloquium laid of them, and we bought them trusting to that affirmation which was false, and that is a deceit. If a man having possession of goods sell them as his own, an action lies for the deceit.

And at last upon much debate judgment was given for the plaintiff. These cases were cited: Cro. Jac. 474, 196, 197; 42 Assiz. 8. Moore, 126; Kenrick's Case, Roll. 1. Abr. 96; Harvey v. Young, Yelv. 40.

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## JENDWINE v. SLADE.

(Court of King's Bench, 1797. 2 Esp. 572.)

This was an action brought to recover damages on the sale of two pictures, one of which was said to be a Sea-piece by Claud Loraine, the other a Fair by Teniers, which the defendant had sold to the plaintiff as originals, when in fact they were copies.

The defence relied on was, that they were sold under a catalogue, not amounting to an absolute warranty, but upon which the buyer was to exercise his own judgment; and further, that a bill had been filed by the defendant, two years ago, to compel the plaintiff to complete the sale; to which he had put in no answer, but paid the money, and that therefore he could not now seek to rescind the contract after such acquiescence

The plaintiff's counsel answered this objection, by insisting that the name of the artist put opposite any picture in a catalogue was a warranty; and if the article sold did not correspond with it, it avoided the sale; and as to the transaction in respect to paying the money, that the plaintiff was deceived, but had brought his action as soon as he discovered the fraud.

Several of the most eminent artists and picture-dealers were called, who differed in their opinions respecting the originality of the pictures.

When the evidence was closed,

Lord Kenyon said: It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase.

With respect to the bringing of the action, his Lordship added, that if any fraud has been committed in a sale, if the party comes recently after discovery of the deception, he is not barred by circumstances having taken place, such as were stated.

The cause was referred to arbitration.

## WOOD v. SMITH.

**(Court of King's Bench, 1829. 4 Car. & P. 45.)**

Assumpsit. The first count of the declaration stated, that, in consideration that the plaintiff would buy a certain mare of the defendant, the defendant undertook and faithfully promised, "that the said mare was sound to the best of his knowledge." And the plaintiff averred, that, confiding, &c., he bought the mare at the price of £25.; and that the defendant did not, nor would regard his said promise, but subtilely contriving, &c., deceived the plaintiff in this, that the said mare was not sound, but, on the contrary thereof, was unsound, as the defendant then well knew. There were other special counts, and the money counts. Plea—General issue.

It was proved, that, at the time of the sale of the mare, the plaintiff said to the defendant, "She is sound of course?" To which the latter replied, "Yes, to the best of my knowledge." And on the plaintiff saying, "Will you warrant her?" the defendant said, "I never warrant, I would not even warrant myself." Evidence was also given, that the mare was unsound, and that the defendant knew it.

Gurney, for the defendant, objected that the declaration should have been in tort and not in contract, as there was an express refusal to warrant.

Lord TENTERDEN, C. J. I think that this declaration is sufficient; there is a count on a promise, that the mare was sound to the best of the defendant's knowledge, with a breach, that he knew her to be unsound. Now, if a man says, when he sells a mare, "she is sound to the best of my knowledge, but I will not warrant her," and it turns out that the mare was unsound, and that he knew it, I have no doubt that he is answerable.

Verdict for the plaintiff, with leave to move to enter a nonsuit.

In the ensuing Term, Gurney moved, in pursuance of the leave given, contending that the action should have been in deceit, and not in assumpsit, because there was an express refusal to warrant. He cited Williamson v. Allison, 2 East, 446, and Dobell v. Stevens, 5 D. & R. 490.

Bayley, J. The general rule is, that whatever a person represents at the time of a sale, is a warranty. But the party may give either a general warranty, or he may qualify that warranty. By a general warranty, the person warrants at all events; but here the defendant gives a qualified warranty, as he only warrants the mare sound for all he knows.

Parke, J. I have very frequently seen such counts as this.

Rule refused.

## POWER v. BARHAM.

(Court of King's Bench, 1836. 4 Adol. & El. 473.)

Assumpsit. The declaration stated that, in consideration that the plaintiff, at the defendant's request, would buy of him four pictures at a certain price, to wit, &c., the defendant "promised the plaintiff that the said pictures were painted by a certain artist or master in painting, called or named Canaletti, otherwise Canaletto." Breach, that the said pictures "were not, nor was either of them, painted by the said artist or master called or named Canaletti, otherwise Canaletto," whereby the said pictures were and are of little or no use, &c., and the plaintiff lost the benefits, &c. Plea, non assumpsit. On the trial before Coleridge, J., at the sittings in Middlesex after last term, it appeared that the defendant sold the pictures to the plaintiff for £160., and, at the time of the sale, gave the following bill of parcels and receipt:

"Mr. N. Power.

"Bought of J. Barham.

"May 14th, 1832.

| | | |
|---|---|---|
| Four pictures, Views in Venice, Canaletto, | | £160.0.0 |
| Settled by two pictures, | £ 50.0.0 | |
| And a bill at five months, | 110.0.0 | |
| "J. Barham." | £160.0.0 | |

A carver and gilder, who had been employed by the plaintiff to procure original pictures for him, gave evidence of previous representations by the defendant to him and to the plaintiff, that the pictures were genuine; some doubt, however, was raised as to the expressions actually used. The witness stated that the pictures were in the manner of Canaletti, and, at the time of the sale, appeared to him worth the money. A witness experienced in paintings stated, that he considered the pictures not to be Canaletti's, and valued them at about £8. each; and some other evidence was given on this point. For the defendant it was contended that the bill of parcels was not a warranty, but only an expression of opinion; and Jendwine v. Slade, 2 Esp. N. P. C. 572, was cited. The learned Judge, in summing up, told the jury that the pictures were admitted not to be Canaletti's, and that the only question on the pleadings was, whether the promise was made; and he submitted to their consideration, upon the whole of the evidence, whether the defendant had made a representation as part of his contract, that the pictures were genuine, not using the name of Canaletti as matter of description merely, or as an expression of opinion upon something as to which both parties were to exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's. His Lordship noticed the argument on behalf of the defendant, as to the bill of parcels; and said that the words of Lord Kenyon, in the case referred to, must be considered, not as a general rule of law, but as a direction to the jury on the circumstances of that case. The jury found a verdict for the plaintiff, saying, "We think the bill of parcels is a warranty."

Lord DENMAN, C. J. I think that the case was correctly left to the jury. We must take the learned Judge to have stated to them that the language of Lord Kenyon in Jendwine v. Slade, 2 Esp. N. P. C. 572, was merely the intimation of his opinion upon such a contract as was then before him. It may be true, that in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord Kenyon in the case referred to. But the case here is that pictures are sold with a bill of parcels, containing the words "Four pictures, Views in Venice, Canaletto." Now words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion. I think that their finding was right: Canaletti is not a very old painter.[3] But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence.

Rule refused.[4]

## McFARLAND v. NEWMAN.

(Supreme Court of Pennsylvania, 1839. 9 Watts, 55, 34 Am. Dec. 497.)

Newman, the plaintiff below, brought an action of assumpsit against McFarland on an alleged warranty of a horse passed to him as sound in all respects but the colt-distemper. It was proved that the horse had a defluxion from the nose at the time of the bargain; that

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[3] Canaletti died in 1768; Claude Lorraine and Teniers (the younger), the painters mentioned in Jendwine v. Slade, died, the first in 1682, the latter in 1694.

[4] Concurring opinions were delivered by Littledale and Williams, JJ.

McFarland assured Newman it was no more than the ordinary distemper to which colts are subject; and that it had been of only a few days' continuance; whereas it was testified that the horse had exhibited the same symptoms all the time McFarland had him (a period of ten or eleven months), and the evidence was very strong that he had an incurable disease called glanders. It was testified also, that the person of whom McFarland had him, had passed him away as a glandered horse, or at least had refused to say to McFarland that he was otherwise; that McFarland had been told of the true nature of the disease by another person; and that he himself had said he feared it was, or would become something worse than the distemper. The judge charged that knowledge of unsoundness without denial of it, would not entitle the plaintiff to recover; but that "a positive averment, made by the defendant at the time of the contract, of a material fact, is a warranty; that it is part or parcel of the contract." The jury found for the plaintiff, assessing damages at $75; and the defendant tendered a bill of exceptions.

Gibson, C. J.[5] On no subject have the decisions been so anomalous as on warranty of chattels; and an attempt to arrive at a satisfactory conclusion about any principle supposed to be settled by them, would be hopeless, if not absurd. Of such jarring materials have they been compounded, that it is impossible to extract from them any principle of general application; and we are left by them in the predicament of mariners compelled to correct their dead reckoning by an observation. The civil law maxim is, doubtless, that a sound article is warranted by a sound price; but the common-law courts started with the doctrine that though the sale of a chattel is followed by an implied warranty of title, and a right of action ex delicto for wilful misrepresentation of the quality; yet that the maxim caveat emptor, disposes of all beside. Thus was the common law originally settled; and the current of decision ran smooth and clear in the channel thus marked out for it, from the days of the year books, till within a few years past, when it suddenly became turbid and agitated; and, as in the case of promises conjured up to elude the Statute of Limitations, it finally ran wild. The judges, in pursuit of a phantom in the guise of a principle of impracticable policy and questionable morality, broke away from the common law, not, however, by adopting the civil law principle of implied warranty as to soundness, but by laying hold on the vendor's commendation of his commodity, and not at first as absolutely constituting an express warranty but as evidence of it.

I say the policy of this principle is impracticable, because the operations of commerce are such as to require that the rules for its regulation admit of as few occasions for reclamation as possible;

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[5] Part of the opinion is omitted.

and I say its morality is questionable, because I am unable to discern anything immoral in the bona fide sale of an article represented to be exactly that as which the vendor had purchased it. It is to be remembered that I am speaking of the sale of a thing accepted by the vendee after opportunity had to inspect and test it, and not of a sale of which he was necessarily compelled by the circumstances to deal on the faith of the vendor's description; nor yet of a sale on the concoction of which he was overreached by misrepresentation or trick. For the latter, he doubtless has his remedy; but not by an action ex contractu; and I therefore lay the vendor's motive out of the case as one that can have no legitimate influence on the question of warranty. But a positive assertion of what he knew not to be either true or false, is as unconscionable, and might be as injurious as an intentional falsehood; and what is the vendee's remedy for it where the scienter cannot be proved? The fallacy of the question, is in assuming that he ought to have any remedy at all.

The relation of buyer and seller, unlike that of cestui que trust, attorney and client, or guardian and ward, is not a confidential one; and if the buyer, instead of exacting an explicit warranty, chooses to rely on the bare opinion of one who knows no more about the matter than he does himself, he has himself to blame for it. If he will buy on the seller's responsibility, let him evince it by demanding the proper security; else let him be taken to have bought on his own. He who is so simple as to contract without a specification of the terms, is not a fit subject of judicial guardianship. Reposing no confidence in each other, and dealing at arms' length, no more should be required of parties to a sale, than to use no falsehood; and to require more of them, would put a stop to commerce itself in driving every one out of it by the terror of endless litigation. Yet such would be the tendency of the civil law scion which the judges have been laboring to engraft on the common-law stock. It would be curious but unprofitable to trace their advances towards the object by the footsteps in the cases. In none of them have I discovered any principle so plausible as that assumed by the judge who tried the present cause, that an averment of a material fact is part of the contract, a position, however, that will not bear a moment's examination.

A sale is a contract executed, on which, of course, no action can be directly founded; but an action may be founded directly on a warranty, and it was doubted in Stuart v. Wilkins, Doug. 18, whether an action could be maintained for a breach of it in any other way; consequently, though it is a concomitant, it is also a collateral, self-existent contract; and no more a part of the sale, than a covenant of warranty in a deed is part of the conveyance. It is not easy to say what notions had previously been entertained; but for a short time after the new doctrine had been broached, the distinction between representation and warranty was ostensibly observed. But in Wood v. Smith, 4 C. & P. 45, it was resolved "that whatever a person represents is a warranty:" and thus the previous distinction, flimsy and inoperative as it had become in practice, was formally laid aside. And that the court went even further, is manifest from a glance at the circumstances. The plaintiff, chaffering for a mare, had said interrogatively, "she is sound, of course," and the defendant had replied, "Yes, to the best of my knowledge;" but to the direct question "Will you warrant her," he answered, "I never warrant, I would not even warrant myself." Yet in the teeth of this peremptory refusal, it was adjudged that he had actually entered into an express warranty, and that the plaintiff had purchased on the faith of it. This conclusion is so forced, unnatural and opposed to the very declared understanding and intent, that one is tempted to think the court had so far lost sight of the nature of a warranty as to have forgotten that it is a contract; "that the assent to every contract must be mutual; that every agreement must be so certain and complete that each party may have an action on it; and that it would be incomplete if either party withheld his assent to its terms."

I quote these common-place principles from Mr. Chitty's Treatise on Contracts, because I happen to have the book at hand. It is true, he says, that in many cases the law implies the party's assent to a promise; but, he also says, that such a contract is an implied one, and our business, at present, is with the elements of an express warranty. Now it is not, and cannot be, a wholesome interpretation which involves a party in engagements he never dreamed of contracting, or to which he expressly refused to assent. If it is true, as it is said to be, that the plain, ordinary and popular sense of words shall prevail, in preference to their strict grammatical sense, the decision in Wood v. Smith is more than questionable; for that the parties themselves put no such meaning on their discourse, as did the court, is evident from the plaintiff's request that the defendant would annex a warranty to his representation, and from the defendant's refusal to do so. After that, it is hard to see what room there was for interpretation. Even the civil-law implication of warranty, if it were inadmissible on no other ground, would be repressed by it, on the foot of the maxim, "expressum facit cessare tacitum." It may be said in extenuation, that the court did not hold the defendant to a warranty of the mare's soundness, but only to a warranty of soundness to the best of his knowledge. So much the worse. He had refused to enter into any warranty whatever, and it would have required no greater stretch to hold that he had entered into a general warranty of soundness, than to hold that he had entered into a special warranty of what he thought or knew. It would, too, have relieved the court from the awkwardness of resting the recovery on the collateral warranty of an immaterial fact, which, assigned as a breach, would not have entitled the plaintiff even to nominal damages. And what makes the judicious grieve, is that all this violence to the ancient principles of the law was gratuitous; for, as in Chandler v. Lopus, Cro. Jac. 4, as well as in the case before us, the plaintiff had a remedy as efficacious by an action for the deceit. * * *

As the cause goes back to another jury, it is proper to intimate the principle on which a correct decision of it must depend. Though to constitute a warranty requires no particular form of words, the naked averment of a fact is neither a warranty itself, nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representation. Should he have used expressions fairly importing a willingness to be thus bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty, merely because the vendee had gratuitously relied on it; for not to have exacted a direct engagement, had he desired to buy on the vendor's judgment, must be accounted an instance of folly. Testing the vendor's responsibility by these principles, justice will be done without driving him into the toils of an imaginary contract.

Judgment reversed, and a venire de novo awarded.[6]

## HAWKINS v. PEMBERTON et al.

(Commission of Appeals of New York, 1872. 51 N. Y. 198, 10 Am. Rep. 595.)

This action was brought to recover damages for an alleged breach of contract of purchase. The defence was a breach of warranty as to the character of the article purchased, also fraud. On the 15th of January, 1867, Burdett, Jones & Co., who were auctioneers in the city of New York, sold the plaintiff twenty-three barrels of what was called blue vitriol. The auctioneer, at the time of the sale, the plaintiff being present, stated that the article was "blue vitriol, sound and in good order." The defendants, being the highest bidders, became the purchasers at eight cents per pound, relying upon the representation of the auctioneer, that it was "blue vitriol," and believing that it was such. At the time of the purchase, the defendants examined some of it, and it had the appearance of blue vitriol, being blue. They took a sample of it away, and the next morning found that it had turned nearly all white on the surface from exposure to the air, and concluding it was not blue vitriol, they immediately notified the plaintiff that they would not take it. The plaintiff then notified them that he should sell it upon their account and look to them for any loss. He accordingly did sell it at auction for about five cents per pound, and the loss was near $400, which this action was brought to recover. It was subsequently discovered, by chemical analysis, that the article contained only from seventeen to twenty-five per cent. of blue vitriol, chemically called sulphate of copper, and that the balance was mostly green vitriol, chemically called sulphate of iron or copperas. It was not possible at the time of the sale to discover, by any examination which could then be made, the true character of this article. It could be discovered by exposure for some hours to the air or by chemical analysis. This article had just been imported from Germany, and it was shown by a manufacturing chemist, who formerly resided in Germany, that it was known there as saltzburger vitriol, and not as blue vitriol. A chemist, sworn on behalf of the plaintiff, testified that it was not blue vitriol, nor white vitriol, but, chemically speaking, mixed vitriol. While sulphate of copper was worth from eight to nine and a half cents per pound, sulphate of iron was worth only one and a half cents per pound.

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[6] Chief Justice Gibson's view has been followed consistently in Pennsylvania. For a comparatively recent case in which his opinion in the principal case was quoted with approval, see Holmes v. Tyson, 147 Pa. 305, 23 Atl. 564, 15 L. R. A. 209 (1892).

At the close of the evidence upon the trial, defendants requested to go to the jury upon the questions of breach of warranty and fraud. The court refused the request, and directed a verdict for the plaintiff, and ordered the exceptions to be heard in the first instance at the General Term. A verdict was rendered accordingly.

Earl, C.[7] This action was brought against the defendants as purchasers of an article called, at the time of the sale, blue vitriol, to recover damages for refusing to take and pay for the same, and upon the trial the court refused to submit the evidence to the jury and ordered a verdict for the plaintiff.

The defendants failed to establish their defense of fraud, and upon that question I think there was no evidence to submit to the jury. We have only therefore to consider whether there was evidence tending to show that the plaintiff at the sale warranted the article to be blue vitriol, sound and in good order, and whether there was a breach of this warranty.

It is unquestioned that there was a warranty that the article was sound and in good order, and I am quite clear that there was no breach of this warranty. It was good, sound saltzburger or mixed vitriol. It was just as it was made; not damaged, or in any way out of order. It was in its natural, normal condition, and it could not be said of such an article that it was unsound.

Did the plaintiff warrant the article to be blue vitriol? It is unquestioned that at the time of the sale, through his auctioneer, he represented it to be blue vitriol, and that the defendants bought it as such, relying upon that representation. To constitute a warranty, it is not necessary that the word "warranty" should be used. It is a general rule that whatever a seller represents, at the time of a sale, is a warranty. Wood v. Smith, 4 Car. & Payne, 45.

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[7] Part of the opinion is omitted.

In Stone v. Denny, 4 Metc. (Mass.) 151, it is said that the courts in their later decisions "manifested a strong disposition to construe liberally, in favor of the vendee, the language used by the vendor in making any affirmation as to his goods, and have been disposed to treat such affirmations as warranties whenever the language would reasonably authorize the inference that the vendee so understood it."

In Oneida Manuf. Society v. Lawrence, 4 Cow. 440, Chief Justice Savage says: "There is no particular phraseology necessary to constitute a warranty. The assertion or affirmation of a vendor concerning the article sold must be positive and unequivocal. It must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." And generally, where the representation is not in writing, the question of warranty is to be submitted to the jury. Duffee v. Mason, 8 Cow. 25.

It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee.

Here it is not questioned that the language used was sufficient to constitute a warranty that the article sold was sound and in good order; and why should it not as well extend to the character of the article? When a buyer purchases an article whose true character he cannot discover by any examination which it is practicable for him to make at the time, why may he not rely upon the positive representation of the seller as to its character as well as to its quality and condition? I can discover no distinction in principle in the two kinds of representation; and yet it is claimed in behalf of the plaintiff that there is a distinction, and certain cases are cited to uphold it, which I will proceed briefly to consider. * * *

I therefore reach the conclusion, both upon principle and authority, that upon the facts of this case a jury might properly have inferred that there was, upon the sale, a warranty that the article sold was blue vitriol. It was at least the duty of the court to have submitted the question of warranty to the jury. I think the facts were so clear and undisputed that the court could, without error, have decided, as a question of law, that there was a warranty, but this it is unnecessary to decide upon this appeal.

The only remaining question to be considered is, whether there was a breach of this warranty, and this can need but little discussion. The article sold, if it was known at all in market, was known by another name. It had only from seventeen to twenty-five per cent of blue vitriol in it. It was not an inferior article of blue vitriol, but a different substance with a small admixture of blue vitriol.

The judgment should therefore be reversed and a new trial granted, costs to abide event. All concur.

Judgment reversed.

## HOBART v. YOUNG.

(Supreme Court of Vermont, 1891. 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693.)

Action to recover damages for deceit and full warranty in the sale of a horse.

The evidence of the plaintiff tended to show that in early June, 1888, he purchased a pair of horses, of which the horse in question was one; that he first saw these horses in May; that about the 1st of June he rode after them with the defendant; and that the defendant then warranted them to be sound. The plaintiff did not purchase them that day, but agreed with the defendant upon a price at which he could have them, and afterwards, on the 5th of June, sent his man Somers with a check and a bill of sale for them. The defendant received the check, and signed the bill of sale. The horses were delivered by the defendant's brother. Upon getting the horses home the plaintiff ascertained that one of them had a ringbone, which was the unsoundness complained of. * * *

The bill of sale which the plaintiff signed was as follows: "Alburgh, June 5th, 1888. J. W. Hobart, bo't of Sumner Young, Esq., one pair of black (Pilot) geldings, sound and kind, $487.50; to be delivered on the cars at the depot with good halters, duties paid, and certificates of the same attached hereto. Rec'd. payment. S. Young."

The court also instructed the jury that the plaintiff could recover if they found that the defendant warranted the horses upon the occasion when the plaintiff rode after them and agreed upon the price, about June 1st.[8]

Rowell, J. * * * It was not error to submit to the jury to find whether there was a verbal warranty on the 2d of June, the last time plaintiff saw the horses before the purchase. Although he did not buy them that day, the price was then agreed upon at which he could have them. The testimony on the part of the plaintiff, admitted without objection, presented two aspects as to warranty, namely, that of a verbal warranty on June 2d, and that of a written warranty on June 5th. The defendant denied both, and said that the bill of sale did not contain a warranty, and that if it did he was not bound by it because of the circumstances in which he signed the bill. No objection was made to the admission of the parol evidence as varying the written contract. In this posture of the case it was the duty of the court to submit both aspects of that question; for it is not necessary that representations, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain, but only that they should be made during the course of the negotiations that lead to the bargain, and should then enter into the bargain as a part of it. Wilmot v. Hurd, 11 Wend. (N. Y.) 585; 2 Benj. Sales, (Corbin's Ed.) § 929.

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[8] Part of the statement of facts and part of the opinion are omitted.

An important question is whether the words "sound and kind," contained in the bill of sale, constitute an express warranty as matter of law. The law of warranty has undergone much change since Chandelor v. Lopus, Cro. Jac. 4, decided in the exchequer chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar-stone was no warranty; for, it was said, every one, in selling his wares, will affirm that they are good, or that the horse he sells is sound; yet, if he does not warrant them to be so, it is no cause of action. But latterly courts have manifested a strong disposition to construe liberally in favor of the purchaser what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. Stone v. Denny, 4 Metc. (Mass.) 155; Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595. And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of communication, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty. And in cases of oral contracts it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not. Foster v. Caldwell's Estate, 18 Vt. 176; Bond v. Clark, 35 Vt. 577; Shippen v. Bowen, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172.

But when the contract is in writing, it is for the court to construe it, and to decide whether it contains a warranty or not, (Wason v. Rowe, 16 Vt. 525;) and by the great weight of recent authority positive statements in instruments evidencing contracts of sale, descriptive of the kind, or assertive of the quality and condition of the thing sold, are treated as a part of the contract and regarded as warranties if the language is reasonably susceptible of that construction, and it is fairly inferable that the purchaser understood and relied upon it as such. Thus, in Hastings v. Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420, the sale note described the article as "prime quality winter sperm oil." The plaintiff declared in assumpsit on a warranty, and had judgment. In Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367, the bill of particulars affirmed the article to be indigo. The court said that that imported an express warranty if it was so intended, and that it must be taken to have been so intended, as there was no evidence to the contrary. In Brown v. Bigelow, 10 Allen (Mass.) 242, a case exactly in point, these very words, "sound and kind," were held to constitute a general warranty of soundness. In Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455, a bought and sold note described the article as "Ceara scrap rubber as per sample, of second quality." The court said that it did not admit of doubt that the note was intended to express the terms of the sale, and that the contract of the parties was to be found in what was thus written, read in the light of the attendant circumstances. Held a warranty that the rubber was of second quality, and that the fact that the plaintiff made such examination of it as he pleased did not necessarily do away with the warranty.

Osgood v. Lewis, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317, is a leading case on this subject. There the bill of particulars contained a statement that the article was "winter-pressed sperm oil," and the question was whether those words were per se a warranty; and it was held that they were, for it was said they could not be regarded as mere matter of opinion or belief, but as the assertion of a material fact that the defendant assumed to know and to warrant the existence of. In Kearly v. Duncan, 1 Head (Tenn.) 397, 73 Am. Dec. 179, the words, "said negroes, sound in body and mind," contained in a receipt for the price paid for them, were held clearly to constitute a warranty of soundness. The words, "being of sound mind and limb, and free from all disease," in a bill of sale of slaves, were held a warranty in Cramer v. Bradshaw, 10 Johns. (N. Y.) 484. This case is criticised by Bennett, J., in Foster v. Caldwell's Estate, 18 Vt. 181, who would treat the words as a mere representation, descriptive of the property sold. But that case seems to have stood the test in New York, while Seixas v. Woods, 2 Caines, 48, 2 Am. Dec. 215, and Swett v. Colgate, 20 Johns. 203, 11 Am. Dec. 266, to which he refers, and which held that no warranty arises from a description of the kind of property sold, have been expressly overruled by Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595, as not properly applying the doctrine that they correctly announce, wherein a contrary application is made, and wherein it is held that there is no distinction in principle between a representation as to quality and condition and a representation as to kind and character. And in 1 Smith, Lead. Cas. (7th Amer. Ed.) 341, it is said that such a distinction is too refined to be practicable.

In Yates v. Pym, 6 Taunt. 446, a description of bacon in a sale note as "prime singed" was held to be a warranty that it was prime singed. So in Bridge v. Wain, 1 Starkie, 504, the goods sold were described in the invoice as "scarlet cuttings." Held a warranty that they answered the known mercantile description of scarlet cuttings. The advertisement of the sale of a ship described her as a "copper-fastened vessel," whereas she was only partially copper-fastened, and not what was called in the trade a "copper-fastened vessel." Held a warranty that she was copper-fastened. Shepherd v. Kain, 5 Barn. & Ald. 240. A sold note described turnip seed as "Skirving's Swedes." Coleridge, J., said that there was no doubt that the statement was made by the defendant a part of the contract, and it was held to be a warranty that the seed was Skirving's. Allen v. Lake, 18 Q. B. 560. In Wetherill v. Neilson, 20 Pa. 448, 54 Am. Dec. 741, the bill of sale described the soda-ash as being of a certain strength, whereas it was of a less strength, and unmerchantable. Held no warranty. It is said in 1 Smith, Lead. Cas. (7th Amer. Ed.) 343, that this case stands almost, if not quite, alone, and cannot be reconciled with the general course of decisions in this country and in England.

In Barrett v. Hall, 1 Aikens (Vt.) 269, the note was payable in "good cooking-stoves." The court said that no definite quality could be intended from the term "good," and that it imported nothing but opinion, and was no warranty, and referred to Chandelor v. Lopus, Cro. Jac. 4, for authority, which is no longer authority. But we do not say that the court was wrong in that case, for "good" is a very common term of praise in trade, and as used in the note, ascribed no particular quality to the stoves, and might well be regarded, in that case, as mere matter of opinion or commendation, and as so understood by the parties. In Wason v. Rowe, 16 Vt. 525, the bill of sale said the horse was "considered sound." Held no warranty; and with good reason, for "considered" was no assertion of a fact, but a mere expression of opinion. The more recent cases in this state recognize the general rule that positive statements of fact by the seller in respect of the kind or the quality of the thing sold that constitute a part of the contract or form its basis, and that are fairly susceptible of such a construction, are to be regarded as warranties. Thus in Beals v. Olmstead, 24 Vt. 114, 58 Am. Dec. 150, one of the reasons given why the defendant's statements ought to be regarded as warranties is that they were made positively, and concerning matters as to which he was supposed and professed to have knowledge. Therefore, it is said, he ought to expect to be bound by them. See, also, Drew v. Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; Enger v. Dawley, 62 Vt. 164, 19 Atl. 478.

It is sufficiently certain, as matter of construction, that the words, "sound and kind," found in the bill of sale before us, were intended by the parties to be a part of the contract of sale, and as such it would be unreasonable to construe them as an expression of mere opinion when they positively ascribe to the horses a condition and a quality that the defendant assumed to know they possessed, and that he had peculiar means of knowing whether they possessed or not, while the plaintiff had no such means. We think the words, reading the instrument in the light of the attendant circumstances, clearly constitute an express warranty of soundness, and that the chief judge was right in so holding.

Judgment affirmed.

## NORRIS et al. v. PARKER.

(Court of Civil Appeals of Texas, 1896. 15 Tex. Civ. App. 117, 38 S. W. 259.)

Finley, J. Appellants' general statement of the nature and result of the suit is accepted by appellee as being correct, and is as follows: "On March 17, 1894, W. H. Parker of Clarksville, Tex., sold and delivered to W. T. Norris and G. B. Dean, at Detroit, Tex., a fine Spanish jack for breeding purposes, and received in payment therefor the sum of $400 cash, and their promissory note for the sum of $400, due and payable to his order on November 15, 1894. At the time of sale all the hair had been smoothly clipped off said jack. On that evening, and the next morning thereafter, the animal showed symptoms of being unwell, and gradually grew worse, until it died, on the tenth day following. In consequence thereof the defendants refused to pay the note therefor when it matured.

On January 7, 1895, the payee, W. H. Parker, instituted this suit in the county court of Red River county, Tex., to enforce the collection of the same. On January 30, 1895, the defendants filed their first amended original answer, and, under oath, specially set up and alleged, by way of cross bill and plea in reconvention, that they purchased the jack from plaintiff under a warranty that it was perfectly sound in every particular, a vigorous and sure foal getter, and that the shearing would not injure its health, but be the very life of same; that they relied on the warranties, and that they were a part of the inducements for making the purchase and paying the price therefor; that it was unsound at the time of the sale, and wholly unable to perform the services of a breeder, without any fault on their part. They further alleged that, if it were not diseased at the time of sale, as before stated, its death was occasioned from the effects of a disease brought on by reason of said shearing, and that the consideration in said note by reason thereof had wholly failed, and prayed for cancellation of same, and judgment over against plaintiff for the sum of $415.

The foregoing statement, while not setting forth all the allegations in defendants' answer, we think, is sufficient to show the grounds of their defense. On January 30, 1895, plaintiff filed his first supplemental petition, which consisted of a general demurrer and a general denial." On January 23, 1896, the case was tried before a jury, and the same resulted in a verdict and judgment for plaintiff in the sum of $513.35, from which judgment this appeal is prosecuted.

The issues upon the trial were "whether the plaintiff, at the time of the sale, warranted the jack to be sound and a sure foal getter, and that the clipping would not hurt it," and whether the warranty had failed. There was a conflict in the evidence between the testimony of the plaintiff and of the defendants. The court charged the jury as follows: "Where a person sells an animal, and warrants it to be sound at the time of such sale, he is bound by his warranty to the vendee. I therefore charge you that if you believe, from the evidence, that plaintiff sold the jack to the defendants at the time alleged, and warranted it to be sound; and if you should believe, from the evidence, that at the time of such sale said jack was unsound, not a sure foal getter, and not as warranted to be by the plaintiff (if plaintiff did give warranty),—you will find for defendants, on their cross bill, for the sum of $415, and interest to date from March 17, 1894, and also find that the note for $400 sued on in this suit is without consideration. But if you should believe, from the evidence, that said jack was sound at the time of sale, and a good breeder, as represented by plaintiff to defendants, you will find for plaintiff for amount of note sued on, interest, and attorney's fees as prayed for, and against the defendants on their cross bills. I further charge you that defendants would be bound to observe all patent conditions and defects in the jack at the time they bought him, and if there were any latent defects in the animal known to plaintiff, and of such a character as to render said jack worthless, and he failed to disclose them, it would be a breach of his warranty (if he made a warranty), and you will find for defendants as above stated."

Appellants' counsel requested of the court the following charge which was refused: "If you believe, from the evidence, that at the time said animal was sold to defendants, its hair was clipped off; and if you further believe, from the evidence, that plaintiff guarantied that the shearing would be the very making of such animal, and that such warranty was part of the inducement for defendants to complete the contract of sale and execute the note sued on; and if you further believe, from the evidence, that said shearing was the proximate cause of the death of said animal, and that defendants exercised ordinary care to prevent the death of said animal as heretofore explained,—you will return a verdict for defendants."

Appellants complain at the charge of the court, and the refusal of their special charge asked. We are of the opinion that the charge of the court is objectionable, and that the substance of the special charge should have been given. Appellants alleged an express warranty that the animal was sound, that it was a sure foal getter, and that it would not suffer injury from having been sheared. The court instructed the jury, in effect, that, notwithstanding such express warranty, the purchasers must take notice of the patent conditions and defects, and that the vendor would not be responsible for latent or hidden defects unknown to him. The jury may have understood by this charge that the purchasers must take notice that the animal had been sheared, and, if there were any evil effects of such shearing, unknown to the vendor, that he would not be liable on his express warranty, even though they should believe that the shearing of the animal caused its death. This is the very reverse of the law of the case. If the vendor warranted to the purchasers that the shearing would not damage the animal, and the shearing did produce its death, then the warranty was broken, and the purchasers could not be held liable for the purchase price of the animal.

It is true that, ordinarily, a general warranty in the sale of chattels does not cover defects which are plain and obvious to the purchaser, or which are at the time known to him; but where there is an express and special warranty, the warrantor is bound by the terms of his contract of warranty. "It is sometimes stated, without qualification, that an express warranty does not cover patent defects, unless expressly included and referred to. But, while this may be true, so far as to raise the presumption that the purchaser was aware of the patent defects, and therefor did not rely upon the warranty for protection against defects of whose existence he was already aware, yet that presumption cannot be held to be conclusive, and, wherever it can be shown that the buyer relied absolutely upon his warranty and made no attempt to exercise his own judgment in the determination of the value and quality of the goods, the warranty will cover obvious, as well as hidden, defects. But, in order that, in any case, the obviousness of the defect may exclude it from the operation of the express warranty, it must be so patent that an ordinary purchaser may discover it, and that no special skill or knowledge is required for its detection. And not only must the defect itself be discoverable, but its full and complete scope and effect. If the patent defect does not at the time of sale appear to be very serious, and it develops into a more serious trouble, the express warranty of soundness will be broken thereby. And the fact that the consequences of the defect cannot be reliably determined in advance is in itself evidence of an intention of the buyer to rely upon the warranty for protection against the possible consequences of the defect. If the seller throws the purchaser off his guard by his representations or actions, or in any other way conceals the defects, they will, of course, so far as that purchaser is concerned, cease to be patent defects, and will be included in the warranty. It hardly needs to be stated that an express warranty may be so constructed as to include every obvious as well as latent defect, and that the present inquiry is simply into the presumption of law when the language of the warranty is general, and contains no specific or necessary reference to the obvious defects." Tied. Sales, § 195.

In Benjamin on Sales (page 627) it is said: "There seems to be no good reason why a warranty may not cover obvious defects as well as others, if the vendor is willing to give it, and the buyer is willing to buy defective property on the assurance of the warranty. If he relies on his own judgment alone, he does not rely on his warranty." "A special warranty on the sale of a horse may be made to cover blemishes or defects which are open and visible, if the intention to do so is clearly manifested," is the language of the supreme court of Minnesota in the case of Fitzgerald v. Evans, 49 Minn. 541, 52 N. W. 143. In Watson v. Roode, 30 Neb. 264, 46 N. W. 491, it is said: "A vendor is liable for patent defects in personal property sold, when it is so stipulated in the warranty." See, also, Henderson v. Railroad Co., 17 Tex. 580, 67 Am. Dec. 675; Hobart v. Young, 12 L. R. A. 694, note; s. c. 63 Vt. 363, 21 Atl. 612; Powell v. Chittick, 89 Iowa, 513, 56 N. W. 652; Williams v. Ingram, 21 Tex. 300.

The same portion of the charge of the court above quoted is made the basis of another assignment of error, and complaint is leveled at that particular portion of the charge which says: "If there were any latent defects in the animal known to plaintiff, and of such a nature as to render said jack worthless, and if he failed to disclose them, it would be a breach of his warranty (if he made a warranty)." The proposition urged by appellants is that, if plaintiff made an express warranty that the animal was sound and a sure foal getter, he was bound by the terms of the warranty, and would not be relieved by the fact that he honestly believed the animal to be sound and a sure foal getter.

On this phase of the case appellants asked the following special charge: "You are instructed that it is not necessary for the vendor of an animal to know that the same is unsound, or not a sure foal getter, in order to make him liable on a warranty of soundness, or that the same was a sure foal getter. If you believe, from the evidence, that the plaintiff warranted the said animal, for which the note sued on was executed, to be sound and a sure foal getter and you further believe, from the evidence, that the said plaintiff honestly believed said animal was sound, and a sure foal getter, at the time of said warranty, but if you further believe, from the evidence, that said animal was unsound, and not a sure foal getter, you will find for defendants, although you may believe that plaintiff honestly believed said warranties to be true at the time they were made." The special charge presented the law, and should have been given.

It is unnecessary to discuss the other assignments of error and the propositions urged thereunder. The principles of law applicable to the two phases of the case, that of express general warranty, and express special or specific warranty, have already been stated. Upon another trial the court should present the two phases of the case as made by the respective parties, and announce the principles of law applicable to each, as laid down in this opinion.

On account of the errors pointed out, the judgment is reversed, and the cause remanded

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## POWERS v. BRIGGS.

(Supreme Court of Michigan, 1905. 139 Mich. 664, 103 N. W. 194.)

MONTGOMERY, J.[9] This action was brought to recover the price of a hay loader sold and delivered to the defendant. The defense was that the loader was bought under an express warranty that it would do good work and would load hay from windrows, and that, if it failed to do so, defendant might return it; that it did not answer the terms of the warranty; and that defendant returned it. There was a sharp contest on the trial. The circuit judge submitted to the jury the three questions: (1) Whether there was such a warranty as claimed; (2) whether defendant gave the machine a fair test within a reasonable time, and found that the machine would not do good work; and (3) whether within a reasonable time thereafter he returned the machine to plaintiff.

If there was evidence which justified the submission of each of these questions to the jury, we think the concise, clear charge of the circuit judge covered all the points in the case, and that no elaboration was necessary. It is insisted, however, that the evidence shows that the sale, when made, was not accompanied by a warranty. Plaintiff's contention in this regard is best stated in his request to charge: "The time when the warranty was made, if any were made, becomes important in this suit. If you find that some time prior to the delivery of the machine the plaintiff, either by phone or otherwise, tried to sell a hay loader to the defendant, and in the negotiations made warranties and representations of what such machine would do, and said that if said machine did not do good work the defendant would not have to keep it, and that it might be returned; and find that the offer and proposal of the plaintiff was not at the time accepted by the defendant, but that the defendant said he would consider the matter, and let the plaintiff know whether he would take the machine or not; and find, further, that the plaintiff afterwards called the defendant by phone and asked him if he was going to take the machine, and whether the plaintiff should order a machine for him, and that the defendant then informed the plaintiff, in substance, that he (the defendant) had concluded not to buy a machine, and that the plaintiff need not order a machine for defendant—that would end the negotiations at that point, and all representations and warranties, if any, made by the plaintiff up to that time, would not bind the plaintiff in any after negotiations or proposals of sale, unless he expressly renewed them. If the status of affairs then was that the plaintiff had made a proposal of sale which the defendant rejected, a new warranty would have to be made by the plaintiff in order to bind him."

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[9] Part of the opinion is omitted.

We do not think this request correctly states the law. The evidence shows that, after the conversation referred to in the request, the subject was again taken up, and the loader ordered. In the view most favorable to plaintiff, it was a question for the jury as to whether the subsequent order had reference to, and was understood to have reference to, the preceding conversation, and whether both parties understood that the loader was ordered under the warranty which was a part of the offer of the machine in the first instance. The case of Childs v. O'Donnell, 84 Mich. 533, 47 N. W. 1108, is easily distinguished. It was there held that a warranty on a sale of one bill of goods did not attach to a sale of another bill at a later time. In the present case the negotiations all related to the identical machine delivered to the defendant, and the question is whether all that was said during the negotiations was understood to have reference to these machines, and whether, in the understanding of the parties, the proposed warranty attached when the sale was finally consummated. * * *

Judgment affirmed.

## SECTION 2.—IMPLIED WARRANTY OF TITLE

### GOULD v. BOURGEOIS.

(Supreme Court of New Jersey, 1889. 51 N. J. Law, 361, 18 Atl. 64.)

DEPUE, J.[10] * * * The theory on which a warranty of title is implied upon the sale of personal property is that the act of selling is an affirmation of title. The earlier English cases, of which Medina v. Stoughton, 1 Salk. 210, 1 Ld. Raym. 593, is a type, adopted a distinction between a sale by a vendor who was in possession and a sale where the chattel was in the possession of a third person; annexing a warranty of title to the former, and excluding it in the latter. In the celebrated case of Pasley v. Freeman, 3 Term R. 51, Buller, J., repudiated this distinction. Speaking of Medina v. Stoughton, this learned judge said that the distinction did not appear in the report of the case by Lord Raymond, and he adds: "If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and, if there be any difference it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on." Nevertheless the English courts continued to recognize the distinction, with its incidents, as adopted in Medina v. Stoughton, to some extent, at least so far as to annex the incident of an implied warranty of title on a sale by a vendor in possession. Later decisions have placed the whole subject of implied warranty of title on a more reasonable basis. Mr. Benjamin, in his Treatise on Sales, after a full examination and discussion of the late English cases, states the rule in force in England at this time in the following terms: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." 2 Benj. Sales, (Corbin's Ed.) §§ 945–961.

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[10] Part of the opinion is omitted.

In this country the distinction between sales where the vendor is in possession and where he is out of possession, with respect to implied warranty of title, has been generally recognized; but the tendency of later decisions is against the recognition of such a distinction, and favorable to the modern English rule. Id. § 962, note 21. Bid. War. §§ 246, 247. The American editor of the ninth edition of Smith's Leading Cases, in the note to Chandelor v. Lopus, after citing the cases in this country which have held that the rule of caveat emptor applies to sales where the vendor is out of possession, remarks that in most of them what was said on that point was obiter dicta, and observes "that there seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant it." 1 Smith, Lead. Cas. (Edson's Ed.) 344. In Wood v. Sheldon [42 N. J. Law, 421, 36 Am. Rep. 523] Chief Justice Beasley, in delivering the opinion of the court, adopted, in terms, the rule stated by Mr. Benjamin, and made it the foundation of decision. The precise question now under discussion did not then arise. In Eichholz v. Bannister, 17 C. B. (N. S.) 708–721, Erle, C. J., said: "I consider it to be clear upon the ancient authorities that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract; and that if he is not the owner his contract is broken. * * * In almost all the transactions of sale in common life, the seller, by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale."

In that case it was held that on the sale of goods in an open shop or warehouse, in the ordinary course of business, a warranty of title was implied; but there is a line of English cases holding that, where the facts and circumstances show that the purpose of the sale, as it must have been understood by the parties at the time, was not to convey an absolute and indefeasible title, but only to transfer the title or interest of the vendor, no warranty of title will be implied. In this proposition the fact that the vendor is in or out of possession is only a circumstance of more or less weight, according to the nature and circumstances of the particular transaction. Thus in Morley v. Attenborough, 3 Exch.500, the holding was that on a sale by a pawnbroker at public auction of goods pledged to him in the way of business there was no implied warranty of absolute title, the undertaking of the vendor being only that the subject of the sale was a pledge, and irredeemable by the pledgeor. In Chapman v. Speller, 14 Q. B. 621, the defendant bought goods at a sheriff's sale for £18. The plaintiff, who was present at the sheriff's sale, bought of the defendant his bargain for £23. The plaintiff was afterwards forced to give up the goods to the real owner. He then sued the defendant, alleging a warranty of title. The court held that there was no implied warranty of title nor failure of consideration; that the plaintiff paid the defendant, not for the goods, but for the right, title, and interest the latter had acquired by his purchase, and that this consideration had not failed. In Bagueley v. Hawley, L. R. 2 C. P. 625, a like decision was made, where the defendant resold to the plaintiff a boiler the former had bought at a sale under a distress for poor rates, the plaintiff having knowledge at the time of his purchase that the defendant had bought it at such sale.

In Hall v. Conder, 2 C. B. (N. S.) 22, the plaintiff, by an agreement in writing by which, after reciting that he had invented a method of preventing boiler explosions, and had obtained a patent therefor within the United Kingdom, transferred to the defendant "the one-half of the English patent" for a consideration to be paid. In a suit to recover the consideration the defendant pleaded that the invention was wholly worthless, and of no public utility or advantage whatever, and that the plaintiff was not the true and first inventor thereof. On demurrer the plea was held bad, for that, in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the statute of James, or that the invention was useful or new; but that the contract was for the sale of the patent, such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment. A like decision was made in Smith v. Neale, 2 C. B. (N. S.) 67.

Chief Justice Erle, in his opinion in Eichholz v. Bannister, describes Morley v. Attenborough, Chapman v. Speller, and Hall v. Conder, as belonging to the class of cases where the conduct of the seller expresses, at the time of the contract, that he merely contracts to sell such title as he himself has in the thing. The opinion is valuable, in that, while it rescues the common-law rule of implied warranty of title from the assaults of distinguished judges who held that caveat emptor applied to sales in all cases, and that in the absence of express warranty or fraud the purchaser was remediless, it also placed the rule under the just limitation that it should not apply where the circumstances showed that the sale purported to be only a transfer of the vendor's title. Expressions such as "if a man sells goods as his own, and the title is deficient, he is liable to make good the loss," (2 Bl. Comm. 451,) or "if he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title," (2 Kent, Comm. 478,)—as a statement of the principle on which the doctrine of implied warranty of title rests, is not inconsistent with the principle adopted by Chief Justice Erle. Stating the principle in the negative form adopted in Morley v. Attenborough, that there is no undertaking by the vendor for title unless there be an express warranty of title, or an equivalent to it by declaration or conduct, affects only the order of proof. It was conceded in that case that the pawnbroker selling his goods undertook that they had been pledged, and were irredeemable by the pledgeor, and if it be assumed, as I think it must be, that the act of selling amounts to an affirmation of title of some sort, but that its force and effect may be explained, qualified, or entirely overcome by the facts and circumstances connected with the transaction, the difference between Morley v. Attenborough and Eicholz v. Bannister will rarely be of any practical importance. * * *

## BURT v. DEWEY.

(Court of Appeals of New York, 1869. 40 N. Y. 283, 100 Am. Dec. 482.)

This was an action to recover damages for the breach of an implied warranty of title to a horse.

The plaintiff testified that in December, 1852, he bought a horse of the defendant, and paid him therefor eighty dollars; that he afterwards sold the horse, which subsequently passed through the hands of several persons. While the horse was in possession of plaintiff, he was identified as a horse formerly in possession of Joseph Dysart; and Dysart testified that said horse was stolen from him, a short time before the purchase by the plaintiff. It was then shown that in 1856, an action was commenced in a Justice's Court by Dysart against the plaintiff for the horse, and a judgment recovered for its value. It did not appear that the defendant had any notice of that action, or that the judgment had been paid.

A motion was made for a nonsuit, the plaintiff waiving all claim for nominal damages, which motion was thereupon granted on the ground that it did not appear that plaintiff had paid the Dysart judgment recovered against him.

On appeal the General Term reversed the judgment, and ordered a new trial; from that order the defendant has appealed to this court.

JAMES, J.[11] * * * The important question in this case is, whether the plaintiff could recover without proving actual loss or damage, by reason of defendant's want of title to the chattel. There was no evidence that plaintiff or his vendees had ever been disturbed in their possession or enjoyment of the property; nor had plaintiff ever parted with any money or property in consequence thereof.

It is true a judgment had been recovered against the plaintiff for the value of the horse; but until satisfied it only established a liability, not a loss. It might never be enforced. As the true owner was deprived of his property by a felony, he might pursue others, through whose hands it had passed, even the defendant, and satisfy his claim against them. Until a satisfaction, the owner's rights of action against others than plaintiff remain intact.

In its operation and legal bearings this case is very like a covenant of warranty for quiet enjoyment in the sale of land. If A. convey land to B., and B. to C., and C. to D., all with covenants of warranty for quiet enjoyment, and D. is evicted, he may sue any or all of the preceding covenantors till he obtain satisfaction; but no intermediate convenantee can sue his covenantor till he himself has been compelled to pay damages upon his own warranty. Withy v. Mumford, 5 Cow. 137; Baxter v. Ryerss, 13 Barb. 267.

In the case of breach of an implied warranty of title to a chattel the vendee is not bound to await legal action against him. If satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it and recover its value in an action against his vendor, by affirmatively establishing that the vendor was without title; or the vendor may await the prosecution of an action. If the vendor be notified of the action and required to defend, a judgment, if obtained, would be conclusive as to his want of title; but if not notified and judgment is obtained, the onus of showing want of title would rest upon the vendee, the same as if surrendered without action. Sweetman v. Prince, 26 N. Y. 224, 232.

If the property be surrendered to the true owner, then the vendee's loss and damage is established; but if a judgment be had against him, either with or without notice, the vendee's loss or damage is not established without proofs of satisfaction or payment of the judgment. In this case the true owner (as in cases of covenants of warranty running with the land) would have a right of action against any possessor subsequent to the larceny; and that possessor against any prior covenantors which might be pursued until this damage or loss is satisfied; hence any intermediate vendee or covenantee could not be permitted to maintain an action against his immediate warrantor or covenantor in the absence of fraud without proof of damage by loss of property or compulsory payment of money.

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[11] Part of the opinion is omitted.

I think the plaintiff on the trial, by omitting to prove payment of the judgment obtained against him, failed to establish a right of action as against the defendant, and hence was properly nonsuited.

The judgment of the General Term should be reversed and that of the Circuit affirmed.

## SECTION 3.—IMPLIED WARRANTY OF QUALITY

### JONES et al. v. JUST.

(Court of Queen's Bench, 1868. L. R. 3 Q. B. 197.)

MELLOR, J.[12] In this case, on the trial before Blackburn, J., at Liverpool, it appeared that the plaintiffs, through Messrs. Beneke & Co., their brokers, entered into a contract with the defendant for the purchase of a quantity of Manilla hemp, to arrive.

The sold note was in the following terms: "Liverpool, 19th Oct., 1865. We have this day sold for you the following goods to Messrs. J. A. Beneke & Co. J. H. V. 200 bales Manilla hemp, expected to arrive p. Richard Cobden, @ Singapore, for Liverpool,......309...... expected to arrive pr. Christopher Newton, @ Singapore for Liverpool, ......209......expected to arrive pr. Fortitude......@ Singapore for London, $\left\{\begin{matrix}\text{H 193}\\ \text{H H1}\end{matrix}\right\}$ ...... expected to arrive pr. Opher, @ Singapore for Liverpool, @ £38 10s. pr. ton of 2240 lbs., cost freight and insurance. Shipping weights. Payment, cash against shipping documents on 21st Oct. 1865, less 2½ % discount."

The shipping documents were duly delivered to the plaintiffs, and the price was paid. All the vessels named in the contract arrived in due course, with the respective numbers of bales of hemp having marks corresponding to those specified in the contract on board; and the bales were delivered to the plaintiffs. On examination of the bales it was found that the whole of those marked J. H. V. were in such a state as to afford strong evidence that they had at some time, probably from a shipwreck when on the voyage from Manilla to Singapore, been wetted through with salt water, had afterwards been unpacked and dried, and then repacked in the bales which were afterwards shipped at Sinpagore.

Manilla hemp is divided into several qualities. The hemp in the bales in question, if in good condition, would have been what is called

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[12] The statement of facts is omitted.

"fair current Manilla hemp," which is not the lowest quality; but in all the bales the hemp was damaged to some extent, though not so far as to make it lose the character of hemp.

After some correspondence between the parties, the hemp was sold by auction by the plaintiffs' orders as "Manilla hemp, with all faults," and at the auction it realized about 75 per cent. of the price which similar hemp would have fetched if undamaged. The price of hemp had risen considerably since the contract, so that the proceeds of the sale were very nearly equal to the invoice price. There was no attempt to shew that the defendant knew of the state in which the hemp had been shipped at Singapore.

At the close of the plaintiffs' case, Mr. Brett, for the defendant, contended that, in point of law, under this written contract, there was no further condition or warranty than that the bales on their arrival should answer the description of bales of Manilla hemp, which they did, as was proved by the fact that the hemp, though sold with a stigma upon it, fetched a price only 25 per cent. below that of sound hemp; and that as to quality or condition there was no warranty; that consequently the maxim caveat emptor applied.

The learned judge expressed an opinion adverse to this view. He said: "I think that the question is for the jury, whether what was supplied under this contract was, when shipped at Singapore, such as to answer the description of reasonably merchantable Manilla hemp, that being the warranty which, I think, the law implies in a contract to supply, as this: though it would be different in a sale of specific things which the purchaser might examine, or of things sold by sample. And I think the question whether it is fairly and reasonably merchantable, is a question of more or less, which must be left to the jury as reasonable men to determine." The judge then reserved leave to move to enter the verdict for the defendant, if there was no evidence to go to the jury of a breach of warranty.

Upon this intimation of opinion, the counsel addressed the jury, and the case was left to them substantially to the effect above stated; and the jury were further told that if they found for the plaintiffs, the damages should be measured by the rate which the hemp was worth when it arrived compared with the rate which the same hemp would have realized had it been shipped in the state in which it ought to have been shipped: thus, in effect, giving the plaintiffs the benefit of the rise in the market.

The jury found for the plaintiffs, damages £756.

Mr. Brett, in the ensuing Term, obtained a rule to enter the verdict for the defendant, pursuant to the leave reserved; or for a new trial, on the ground of misdirection as to the measure of damages, which he contended ought at most to have been the difference between the value of the article actually delivered, viz., fair average Manilla hemp in a damaged state, and the value of sound Manilla hemp of the lowest quality which might have been supplied at Singapore under this contract. The other objections to the direction were substantially only varied modes of putting the point reserved.

We thought that if the contract had the effect which the direction stated it to have, the true measure of the damages was given, as it put the plaintiffs in the position in which they would have been if the contract had been fulfilled; but we took time to consider the question as to what the contract really was, which is no doubt one of importance and difficulty.

After careful consideration, we are of opinion that Blackburn, J.'s, direction was substantially correct. On the argument before us, it was contended that the contract was performed on the part of the defendant by the shipping at Singapore of an article which answered the description of "Manilla hemp," although at that time it was so damaged as to have become unmerchantable. It was said that there being no fraud on the part of the vendor, and both parties being equally ignorant of the past history and actual condition of the article contracted for, and neither of them having had the opportunity of inspecting it, it was the duty of the vendees to have stipulated for a merchantable article if that was what they intended to contract for. In other words, it was said that the maxim, caveat emptor, applied in such a case, in the same way as on a sale of a specific article by a person not being the manufacturer or producer, even though the defect was latent and not discoverable upon examination.

We are of opinion that there is a great distinction between the present case and the sale of goods in esse, which the buyer may inspect, and in which a latent defect may exist, although not discoverable on inspection.

The cases which bear upon the subject do not appear to be in conflict, when the circumstances of each are considered. They may, we think, be classified as follows:

First, where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim caveat emptor applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer: Parkinson v. Lee, 2 East, 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment he may if he chooses require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of the sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim caveat emptor applied. Emmerton v. Mathews, 7 H. & N. 586, 31 L. J. (Ex.) 139.

Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party there is no implied warranty. Barr v. Gibson, 3 M. & W. 390.

Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is not warranty that it shall answer the particular purpose intended by the buyer. Chanter v. Hopkins, 4 M. & W. 399; Ollivant v. Bayley, 5 Q. B. 288.

Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. Brown v. Edgington, 2 Man. & G. 279; Jones v. Bright, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. Laing v. Fidgeon, 4 Camp. 169; 6 Taunt. 108. And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use. Shepherd v. Pybus, 3 Man. & G. 868.

If, therefore, it must be taken as established that, on the sale of goods by a manufacturer or dealer to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use, or shall be merchantable, as the case may be, it is difficult to understand why a similar term is not to be implied on a sale by a merchant to a merchant or dealer who has had no opportunity of inspection. Accordingly in the case of Bigge v. Parkinson, 7 H. & N. 955, 31 L. J. (Ex.) 301, upon a contract to supply provisions and stores to a ship guaranteed to pass the survey of the East India Company's officers, it was held by the Court of Exchequer Chamber that there was an implied term in the contract, that the stores should be reasonably fit for the purpose for which they were to be supplied, notwithstanding that the vendor had specially contracted that they should pass the survey of the East India Company's officers.

We are aware of no case in which the maxim, caveat emptor, has been applied where there has been no opportunity of inspection, or where that opportunity had not been waived. The case of Gardiner v. Gray, 4 Camp. 144, 145, appears strongly in point to the present. The contract was for the sale of twelve bales of waste silk imported from the continent, and before it was landed samples were shewn to plaintiff's agent, and the bargain was then made, but without reference to the sample. It was purchased in London, and sent to Manchester, and on its arrival there was found to be of a quality not saleable under the denomination of "waste silk." Lord Ellenborough expressed his opinion that "the purchaser under such circumstances had a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity the maxim, caveat emptor, does not apply."

In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is unnecessary to put any other question to the jury; thus, in Wieler v. Schilizzi, 17 C. B. 619, 25 L. J. (C. P.) 89, and in Josling v. Kingsford, 13 C. B. (N. S.) 447, 32 L. J. (C. P.) 94, the substantial question put to the jury was, did the goods delivered reasonably answer the description in the contract? And the answer of the jury being that they did not, that answer sufficed to determine each case. In one of those cases there was no opportunity to inspect, in the other there was. So in the case of Nichol v. Godts, 10 Ex. 191, 23 L. J. (Ex.) 314, where the contract was for the sale of "foreign refined rape oil, warranted only equal to sample," it was held in an action for not accepting the article tendered, that it was necessary for the vendor to establish that it was not only equal to the sample as to quality, but that it was in fact such an article as answered the description of foreign refined rape oil. In Wieler v. Schilizzi, 17 C. B. 619, 25 L. J. (C. P.) 89, in which there was no opportunity to inspect, and no express stipulation as to quality, it would have been necessary, had the finding of the jury affirmed that the article delivered did in fact answer the description of "Calcutta linseed," to determine whether the judge ought not to have put the further question, was it reasonably merchantable? It certainly was not determined that such a question would have been wrong, though perhaps the words "tale quale" in that contract might have the effect of excluding any such warranty; and Willes, J., in his judgment, 17 C. B. at p. 624, said that the purchaser in that case "had a right to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed."

It appears to us that, in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description. In the words of Lord Ellenborough in Gardiner v. Gray, 4 Camp. at p. 145, "Without any particular warranty this is an implied term in every such contract." In the present case the question appears to be, was the article as delivered at Singapore merchantable or saleable in the market under the description of "Manilla hemp?" Blackburn, J., appears to have divided that question into two, viz.: Was the article, in fact, Manilla hemp? Secondly, was it merchantable? The precise mode of submitting the question is not material, provided the substantial direction was correct, as we think it was.

The counsel for the defendant relied upon a case of Turner v. Mucklow, 8 Jur. (N. S.) 870, 6 L. T. (N. S.) 690, tried before Mellor, J., in the year 1862, at Liverpool. In that case the plaintiffs were calico printers, and had contracted to sell to the defendant, who was a drysalter and dye extract manufacturer, a boat-load of "spent madder." The defendant, not finding the spent madder supplied suitable for his purpose, repudiated the contract, and refused to pay for it. It appeared that the plaintiffs, in their trade as calico printers, used large quantities of madder roots, having extracted from which the finer colouring matter by chemical processes they placed the refuse or spent madder in a large heap in their yard. They occasionally used portions of it, and by the application of other chemical processes extracted from it a colouring matter called garancine, but they did not manufacture spent madder for sale. On a previous occasion they had sold to the defendant, who was a manufacturer of garancine, a small quantity of spent madder from their accumulation; and on the occasion in question the defendant, by letter, bargained with the plaintiffs for a quantity of their spent madder, which he did not inspect before delivery, and upon a portion of it being used by the defendant for the purpose of manufacturing garancine, it turned out that the garancine produced by it was of very inferior quality and unmarketable. The jury were directed that if the article supplied fairly and reasonably answered the description of "spent madder," there was no implied warranty that it was of any particular quality or fitness for any particular use, and upon that direction the jury found a verdict for the plaintiffs; and upon the argument on a rule which was obtained for a new trial, on the ground of misdirection, the Court of Exchequer held the direction to be right; Martin, B., declaring his opinion to be "that no direction was ever more correct."

In that case it is to be observed that the defendant had the opportunity, if he had chosen to avail himself of it, to inspect the heap of spent madder; he knew that it was the refuse madder after it had gone through the plaintiffs' processes, and that it was not manufactured for sale. These circumstances entirely distinguish that case from the present.

The counsel for the defendant also relied upon the statute 19 & 20 Vict. c. 60, § 5,[13] as a sort of implied legislative declaration of the law of England upon that subject in favour of his argument; but, upon examining the section referred to, it does not appear to bear out that view, for all that it declares is, that a seller of goods, without knowledge that they are defective or of bad quality, shall not be held to have warranted their quality or sufficiency.

It has already appeared that there is not in general, on the sale of goods in England to be supplied, an implied warranty that they shall be of any particular quality or sufficiency for any particular purpose, but merely that they shall be merchantable goods of the description bargained for. The present case depends on the distinction between a sale of particular articles and a contract to supply articles of a particular kind.

The authority of Chancellor Kent, Kent's Commentaries, vol. 2, p. 479 of the 6th Ed., the last by the author himself, (11th Ed., pp. 633–635,) was also appealed to; but as the American cases which he cites are generally adverse to his opinion, it can at most be said that the opinion of an eminent writer is opposed to the authority of the cases which he cites.

It appears to us, in the result of this case, that the maxim of caveat emptor cannot apply, and that it must be assumed that the buyer and seller both contemplated a dealing in an article which was merchantable. The buyer bought for the purpose of sale, and the seller could not on any other supposition than that the article was merchantable have found a customer for his goods, and the buyer must be taken to have trusted to the judgment, knowledge, and information of the seller, as it is clear that he could exercise no judgment of his own; and this appears to us to be at the root of the doctrine of implied warranty, and that in this view it makes no difference, whether the sale is of goods specially appropriated to a particular contract, or to goods purchased as answering a particular description.

It was contended further by the defendant's counsel that the shippers at Singapore were the persons who selected the goods in question, and that the defendant, who merely sold them to arrive, was as little aware of their true condition when shipped as the plaintiffs; but it is clear that the defendant, if not directly connected with the shippers as his correspondents, must at least have purchased from them, and had recourse against them for not supplying an article reasonably merchantable.

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[13] "Where goods shall after the passing of this act be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods with all faults shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered without such warranty to warrant that the same are fit for such purpose." [This statute applies only to Scotland.]

The remarks of Cockburn, C. J., on the argument in Bigge v. Parkinson, 7 H. & N. at p. 959, though not in terms repeated by him in delivering the judgment of the Court of Exchequer Chamber, are really involved in it, and are very closely in point here.

We are therefore of opinion that Blackburn, J.'s, direction was right, and that this rule must be discharged.

Rule discharged.

## BARNARD v. KELLOGG.

(Supreme Court of the United States, 1870. 10 Wall. 383, 19 L. Ed. 987.)

Error to the Circuit Court for the District of Connecticut, the case being this:

In the summer of 1864, Barnard, a commission merchant residing in Boston, Massachusets, placed a lot of foreign wool, received from a shipper in Buenos Ayres, and on which he had made advances, in the hands of Bond & Co., wool brokers in Boston, to sell, with instructions not to sell unless the purchaser came to Boston and examined the wool for himself. These brokers sent to E. N. Kellogg & Co., merchants and dealers in wool, in Hartford, Connecticut, at their request, samples of the different lots of wool, and communicated the prices at which each lot could be obtained. Kellogg & Co., in reply, offered to take the wool, all round, at fifty cents a pound, if equal to the samples furnished, and Bond & Co., for their principal, on Saturday, the 6th day of August, by letter and telegram, accepted this offer, provided Kellogg & Co. examined the wool on the succeeding Monday and reported on that day whether or not they would take it. Kellogg & Co. acceded to this condition, and the senior member of the firm repaired to Boston on the day named and examined four bales in the broker's office as fully as he desired, and was offered an opportunity to examine all the bales, and have them opened for his inspection. This he declined to do, and concluded the purchase on the joint account of all the plaintiffs. Some months after this, on opening the bales it was ascertained that a portion of them were falsely and deceitfully packed, by placing in the interior rotten and damaged wool and tags, which were concealed by an outer covering of fleeces in their ordinary state. This condition of things had been unknown to Barnard, who had acted in good faith. It was, however, communicated to him, and he was asked to indemnify the purchaser against the loss he sustained in consequence of it. This he declined to do, and the purchaser brought this suit. The declaration counted:

1st. Upon a sale by sample.

2d. Upon a promise, express or implied, that the bales should not be falsely packed.

3d. Upon a promise, express or implied, that the wool inside of the bales should not differ from the samples by reason of false packing.

The court below, trying the cause without the intervention of a jury, held that there was no express warranty that the bales not examined should correspond to those exhibited at the brokers' store, and that the law under the circumstances could not imply any. But the court found as matters of fact, that the examination of the interior of the bulk of bales of wool generally, put up like these, is not customary in the trade; and though possible, would be very inconvenient, attended with great labor and delay, and for these reasons was impracticable; and that by the custom of merchants and dealers in foreign wool in bales in Boston and New York, the principal markets of this country where such wool is sold, there is an implied warranty of the seller to the purchaser that the same is not falsely or deceitfully packed, and the court held as a matter of law, that the custom was valid and binding on the parties to this contract, and gave judgment for the purchaser.

This writ of error was taken to test the correctness of this ruling.

Mr. Justice Davis delivered the opinion of the court.

No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies.

One of the main reasons why the rule does not apply in the case of a sale by sample, is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of caveat emptor in this country, that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina), sanction it.

Applying this acknowledged rule of law to this case, it is easy to settle the rights of the parties, and to interpret the contract which they made. That the wool was not sold by sample clearly appears. And it is equally clear that both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased. Barnard expressly stipulated, as a condition of sale, that Kellogg should examine the wool, and he did examine it for himself. If Kellogg intended to rely on the samples as a basis of purchase, why did he go to Boston and inspect the bales at all, after notice that such inspection was necessary before the sale could be completed? His conduct is wholly inconsistent with the theory of a sale by sample. If he wanted to secure himself against possible loss, he should either have required a warranty or taken the trouble of inspecting fully all the bales. Not doing this, he cannot turn round and charge the seller with the consequences of his own negligence. Barnard acted in good faith, and did not know or have reason to believe that the wool was falsely packed. The sale on his part was intended to be upon the usual examination of the article, and the proceeding by Kellogg shows that he so understood it, and it is hard to see what ground of complaint even he has against Barnard. It will not do to say that it was inconvenient to examine all the bales, because if inconvenient it was still practicable, and that is all, as we have seen, that the law requires.

The case of Salisbury v. Stainer, reported in 19 Wend. (N. Y.) 159, 32 Am. Dec. 437, is similar in its facts to this case, and the court applied to it the rule of caveat emptor. There bales of hemp were sold which turned out to be falsely packed. The purchaser wished to treat the sale as a sale by sample; but the court said to him, "You were told to examine for yourself, and having opened one bale, and at liberty to open all, and omitting to do it, you cannot be permitted to allege that the sale was a sale by sample, nor to recover damages as on an implied warranty." It is, therefore, clear by the general principles of law, adopted in the interests of trade and commerce, that the seller in this instance was not answerable over for any latent defects in the bales of wool.

But the learned court below having found that by the custom of dealers in wool in New York and Boston there is a warranty by the seller implied from the fact of sale, that the wool is not falsely packed, and having held Barnard bound by it, the inquiry arises whether such a custom can be admitted to control the general rules of law in relation to the sale of personal property.

It is to be regretted that the decisions of the courts, defining what local usages may or may not do, have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them, and on this account mainly the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle, as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. See notes to Wigglesworth v. Dallison, 1 Smith's Leading Cases, 498; 2 Parsons on Contracts, §§ 9, 535; Taylor on Evidence, 943, and following.

Usage, says Lord Lyndhurst, "may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." Blackett v. Royal Exchange Assu. Co., 2 Crompton & Jervis, 249. And it is well settled that usage cannot be allowed to subvert the settled rules of law. See note to 1 Smith's Leading Cases, supra. Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine, says the court, in Thompson v. Ashton, 14 Johns. (N. Y.) 317, "would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels."

In Massachusetts, where this contract was made, the more recent decisions on the subject are against the validity of the custom set up in this case. In Dickinson v. Gay, 7 Allen, 29, 83 Am. Dec. 656, which was a sale of cases of satinets made by samples, there were in both the samples and the goods a latent defect not discoverable by inspection, nor until the goods were printed, so that they were unmerchantable. It was contended that by custom there was in such a case a warranty implied from the sale that the goods were merchantable. But the court, after a full review of all the authorities, decided that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject, and therefore void. If anything, the case of Dodd v. Farlow, 11 Allen, 426, 87 Am. Dec. 726, is more conclusive on the point. There forty bales of goat skins were sold by a broker, who put into the memorandum of sale, without authority, the words "to be of merchantable quality and in good order."

It was contended that by custom, in all sales of such skins, there was an implied warranty that they were of merchantable quality, and, therefore, the broker was authorized to insert the words, but the court held the custom itself invalid. They say, "It contravenes the principle, which has been sanctioned and adopted by this court, upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the subject." It is clear, therefore, that in Massachusetts, where the wool was sold and the seller lived, the usage in question would not have been sanctioned.

In New York there are some cases which would seem to have adopted a contrary view, but the earlier and later cases agree with the Massachusetts decisions. The question in Frith v. Barker, 2 Johns. 327, was, whether a custom was valid that freight must be paid on goods lost by peril of the sea, and Chief Justice Kent, in deciding that the custom was invalid, says: "Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law." In Woodruff v. Merchants' Bank, 25 Wend. 673, a usage in the city of New York, that days of grace were not allowed on a certain description of commercial paper, was held to be illegal. Nelson, chief justice, on giving the opinion of that court, says: "The effect of the proof of usage in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York;" and adds, "if the usage prevails there, as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." And, in Beirne v. Dord, 5 N. Y. 95, 55 Am. Dec. 321, the evidence of a custom that in the sale of blankets in bales, where there was no express warranty, the seller impliedly warranted them all equal to a sample shown, was held inadmissible, because contrary to the settled rule of law on the subject of chattels.

But the latest authority in that State on the subject, is the case of Simmons v. Law, *42 N. Y. 219. That was an action to recover the value of a quantity of gold-dust shipped by Simmons from San Francisco to New York on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, say: "A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined."

In Pennsylvania this subject has been much discussed, and not always with the same result. At an early day the Supreme Court of the State allowed evidence of usage, that in the city of Philadelphia the seller of cotton warranted against latent defects, though there were neither fraud on his part or actual warranty. Snowden v. Warder, 3 Rawle, 101. Chief Justice Gibson, at the time, dissented from the doctrine, and the same court, in later cases, has disapproved of it (Coxe v. Heisley, 19 Pa. 243; Wetherill v. Neillson, 20 Pa. 448, 54 Am. Dec. 741), and now hold that a usage, to be admissible, "must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

It would unnecessarily lengthen this opinion to review any further the American authorities on this subject. It is enough to say, as a general thing, that they are in harmony with the decisions already noticed. See the American note to Wigglesworth v. Dallison, 1 Smith's Leading Cases, where the cases are collected and distinctions noticed.

The necessity for discussing this rule of evidence has often occurred in the highest courts of England on account of the great extent and variety of local usages which prevail in that country, but it would serve no useful purpose to review the cases. They are collected in the very accurate English note to Wigglesworth v. Dallison, and are not different in principle from the general current of the American cases. If any of the cases are in apparent conflict, it is not on account of any difference in opinion as to the rules of law which are applicable.

These rules, says Chief Justice Wilde, in Spartali v. Benecke, 10 Common Bench, 222, "are well settled, and the difficulty that has arisen respecting them, has been in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved." But this difficulty does not exist in applying these rules to the circumstances of this case. It is apparent, that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty, which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of caveat emptor, and contracted accordingly. This they had the right to do, and by the terms of the contract the law placed on the buyer the risk of the purchase, and relieved the seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose on the seller a burden which the law said, on making his contract, he should not carry. By this means a new contract is made for the parties, and their rights and liabilities under the law essentially altered. This, as we have seen, cannot be done. If the doctrine of caveat emptor can be changed by a special usage of trade, in the manner proposed by the custom of dealers of wool in Boston, it is easy to see it can be changed in other particulars, and in this way the whole doctrine frittered away.

It is proper to add, in concluding this opinion, that the conduct of the parties shows clearly that they did not know of this custom, and could not therefore have dealt with reference to it.

Judgment reversed, and the cause remanded with directions to award a venire de novo.

BRADLEY and STRONG, JJ., dissented.

## CAMPION v. MARSTON.

(Supreme Judicial Court of Maine, 1904. 99 Me. 410, 59 Atl. 548.)

EMERY, J.[14] In the spring of 1890 Mr. Campion, the plaintiff, was the owner of a stack of ice at Sebago Lake, measuring about 1,400 tons. Messrs. Jones & Marston were a firm of brokers and dealers in ice, having their office at Hallowell. On May 24, 1900, presumably after some prior conversation or correspondence, Mr. Marston, for the firm, wrote to the plaintiff as follows: "The ice you have we can give $3.75 for F. O. B. for June, July shipment; will take it as soon as we can. The ice to be weighed on the wharf by a sworn weigher." This offer was practically accepted. It was mutually understood that the price $3.75 was the price per ton, that the place of delivery was on board ship at Portland, and that the vessels were to be furnished by Jones & Marston, the purchasers. Nothing appears to have been said or written by either party about the quality of ice, whether merchantable or not; nor does it appear that Jones & Marston inspected the ice before purchasing, though, so far as appears, they could have done so.

Under this contract of sale the plaintiff delivered the ice on board ship at Portland to the amount of 1,390 tons by weight, and Jones & Marston accepted it, and carried it away to market. It was weighed by a sworn weigher as it went on board. The plaintiff now seeks to recover the full contract price of $3.75 per ton for the whole 1,390 tons. The defendant claims a reduction in price on the ground that much of the ice was not merchantable when delivered. The pivotal question of law is whether this defense is admissible. Two subsidiary questions are presented by the exceptions, viz.: (1) Whether the contract of sale of the ice included by implication an assurance or warranty, that the ice was merchantable; (2) whether the acceptance of the ice at the place of delivery on board ship constituted a satisfaction or waiver of such warranty.

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[14] Part of the opinion is omitted.

Ice of a certain degree of purity and hardness is a merchantable commodity, and as such has a quotable market price. If of less than that degree of purity and hardness, it has no quotable market price, and is not merchantable—is not sure of a sale. Ice is not graded like grain or cotton, each grade having its own market and price. If not merchantable, its sale at any price is uncertain. Indeed, the term "ice" in the trade means "merchantable ice." Hence, whenever a contract of sale of ice is made, it is a contract of sale of merchantable ice, unless otherwise stipulated. The purchaser becomes entitled to receive merchantable ice. Good faith requires the seller to furnish it. Good faith, bona fides, should be as much of an essential part of a contract now as it was in the time of Justinian.

Ice is homogeneous. A particular lot of ice has no individuality like a domestic animal, a building, a parcel of real estate, a factory, a machine or plant, or any other specific individual article, where the purchaser ordinarily has a choice and makes an examination and selection. Of course, if the purchaser of ice does in fact examine ice before purchasing, and buys upon his own judgment, he may, perhaps come under the rule of caveat emptor; but this purchaser is not shown to have done so. The plaintiff was offered and accepted what it conceded to have been the price for merchantable ice. In law, as well as in morals and honor, he must be held to have promised that his ice to be delivered was of that quality.

Messrs. Jones & Marston received the ice into their vessels at Portland as delivered. While being taken from the cars, weighed, and put on board ship it was open to view and inspection, and was seen by their agents. These circumstances may be evidence, and even strong evidence, that they accepted the ice bargained for, and in full satisfaction of the contract of sale, including all that good faith demanded of the plaintiff; but the circumstances do not in themselves constitute, as a matter of law, an acceptance in satisfaction or waiver of the plaintiff's promise that the ice was merchantable. Jones & Marston were not obliged to decide the matter then. They could lawfully have refused to receive the ice if not merchantable; or they could have taken it, leaving the question of rebate for unmerchantable ice to be determined afterwards. It does not necessarily follow from their acceptance of the ice that they released the plaintiff from his promise or obligation that the ice was merchantable. Whether they did in fact take the ice as full satisfaction of the contract of sale, and thus release the plaintiff from that obligation, was a question of fact for the jury. * * *

Exceptions and motion overruled.

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## RANDALL v. NEWSON.

(Court of Appeal, Queen's Bench Division, 1877. 2 Q. B. Div. 102.)

BRETT, J. A.[15] This case was tried upon the footing that it was an action brought against the defendant, a coach-builder, to recover damages in respect of injuries to the plaintiff's horses and carriage, by reason of the defendant having supplied to the plaintiff a defective carriage pole. The jury found that the pole was not reasonably fit and proper for the use of the carriage; but that there was no negligence on the part of the defendant (including, of course, his servants or agents) in supplying the pole. The price of a new pole was £3. The damage done to the horses and carriage was much more. But the only damages found by the jury were £3. Upon these findings the court of queen's bench, applying to this contract the principle laid down in Readhead v. Midland Railway Co., L. R. 2 Q. B. 412, in error L. R. 4 Q. B. 379, gave judgment for the defendant. No dispute was made at the trial, or in argument, as to the nature of the order given and accepted; the questions argued were whether the defendant was liable at all, and what was the extent of damages to which he might be subjected, if he was liable at all.

Now as to these questions, it is to be taken, although nothing specific seems to have been said, that the order given and accepted was not merely for a pole in general, but for the supply of a pole for the plaintiff's carriage; and that the contract therefore was for the purchase and sale, or supply, of an article for a specific purpose. In other words, the subject-matter of the contract was not merely a pole, but a pole for the purchaser's carriage; or, to state the proposition in an equivalent form, the thing, which would, if the contract were formally drawn up, be described in it as the subject-matter of it, would not be merely a pole generally, but a pole to be purchased for a specific purpose, namely to be used in the plaintiff's carriage. The question is, what, in such a contract, is the implied undertaking of the seller as to the efficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?

In order to decide this question it seems advisable to ascertain the primary or governing principle on which the earlier cases were decided, and to see whether the principle on which they were decided ought to be modified by the decision in Readhead v. Midland Railway Co. The earliest case seems to be Parkinson v. Lee, 2 East, 314, in 1802. It is sufficient to say of it that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled. Neither can the case of Fisher v. Samuda, 1 Camp. 190, in 1808, be said to decide anything. The first cases of importance are Gardiner v. Gray, 4 Camp. 144, and Laing v. Fidgeon, 6 Taunt. 108, in 1815. In Gardiner v. Gray the contract was for the purchase and sale of "waste silk." The silk was imported, and the bulk had not been seen either by the defendant, the seller, or the plaintiff, the buyer. Lord Ellenborough said: "I am of opinion that, under such circumstances" (i. e. a sale of silk as waste silk) "the purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract." The contract was for the purchase and sale of a commodity described generally, not described to be ordered or supplied for a particular purpose. The description of it was that it was waste silk. From that it is implied that it is, or in other words it is assumed that it might be, specifically described as saleable waste silk. The decision, therefore, is that the commodity offered and delivered must answer the description of it and be saleable waste silk. The principle is that the commodity offered must answer the description of it in the contract. Laing v. Fidgeon is to the same effect.

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[15] Part of the opinion is omitted. An opinion was delivered by Kelly, C. B.

In Gray v. Cox, 4 B. & C. 108, 115, in 1825, the case was decided on a variance; but Abbott, C. J., stated that he was of opinion, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." The commodity ordered was copper for sheathing the ship Coventry. It was proved that no defect could be discovered by inspection of the article, and it was admitted that the defendants were ignorant of the defective quality of the copper. It is obvious that Lord Tenterden did not consider the seller relieved by reason of the defect being latent.

This ruling of Lord Tenterden was adopted in the decision of Jones v. Bright, 5 Bing. 533, 540, in 1829. The contract was for copper sheathing for a ship. The question proposed by Ludlow, Serjt., in argument was, "whether the law will, according to the dictum of Lord Tenterden, in Gray v. Cox, 4 B. & C., at p. 115, lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him." Here, therefore, the whole proposition, with and without limitations, was plainly laid before the judges for their consideration.

The answer given by Best, C. J., was: "I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable,—that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. * * * Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. * * * The law then resolves itself into this,—that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." Nothing can be more clear than that the rule is advisedly enunciated as a warranty without limitation. Brown v. Edgington, 2 M. & G. 279, is to the same effect.

In Wieler v. Schilizzi, 17 C. B. 619, 622, 25 L. J. (C. P.) 89, the contract was for "Calcutta linseed." Jervis, C. J., told the jury that the question for them to consider was, "whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract." Cresswell, J., said, "They were to say whether the article delivered reasonably answered the description of Calcutta linseed." Crowder, J., said, "The jury in effect found that the article delivered did not reasonably answer the description in the contract." Willes, J., said, "The purchaser had a right to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for." In this case it is to be observed that all the judges adopted the form of stating the principle which was used by Lord Ellenborough in Gardiner v. Gray, 4 Camp. 144.

In Nichol v. Godts, 10 Ex. 191, 23 L. J. (Ex.) 314, the contract was for "foreign refined rape oil, warranted only equal to samples." The oil offered was equal to samples, but both samples and oil were adulterated. Parke, B., told the jury "that the statement in the sold-note as to the samples related to the quality only of the article, and that according to the contract the defendant was entitled to have rape oil delivered to him." Platt, B., in banc, said: "I understand that the oil to be delivered was to be equal to the samples in quality. But the defendant did not refuse to accept the oil tendered to him on the ground that it did not equal the samples, but on account of its not being foreign refined rape oil at all. And the learned judge told the jury that if they should think that was so, the defendant was not bound to accept it. That direction was perfectly correct. If the jury had found that the article which the plaintiff tendered was known in the market under the name and description of foreign refined rape oil, the plaintiff would have been entitled to succeed; but the question was put to the jury, and they were of opinion that it was not known as such." And Parke, B., said "the evidence went to show that the oil offered did not answer the description of the article sold."

This form of stating the rule was distinctly adopted in Josling v. Kingsford, 13 C. B. (N. S.) 447, 32 L. J. (C. P.) 94, by Erle, C. J., and Willes, J. Erle, C. J., told the jury "that the defendant could only perform his part of the contract by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid; and that if they should be of opinion that the article delivered by the defendant as oxalic acid did not properly fulfil that description they should find for the plaintiff."

I have cited these cases, and the principles laid down in them, in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to contracts of purchase and sale of somewhat different kinds have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognized in Jones v. Just, L. R. 3 Q. B. 197. In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose.

The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale. Unless, therefore, there is some binding authority to the contrary, we ought not now to introduce by implication a limitation into contracts of purchase and sale which has never been introduced before. * * *

Judgment reversed.[16]

## WHITE v. OAKES et al.

(Supreme Judicial Court of Maine, 1896. 88 Me. 367, 34 Atl. 175.)

HASKELL, J. The defendants, being dealers in furniture, and not manufacturers, sold a folding bed to the plaintiff, without express warranty of any kind. The bed proved dangerous to the persons using it, not from defective parts, but from faulty design. It proved to be a trap, suited to crush its occupants by shutting up like a jackknife when slept upon. The weight of its occupants, if sufficient to overcome the gravity of the upright headpiece, would tip that forward, and the bed collapse. This bed did so, injuring a man sleeping in it so that he became partially paralyzed. The defendants had no knowledge of this danger. If, therefore, the plaintiff may recover in this case, it must be from an implied warranty against the dangers of its contrivance.

The mechanism of this bed could be observed by the purchaser as well as by the vendor. Neither, unless skilled in mechanics, would be likely to discover the dangers of it, unaided by any object lesson. The hinge or flexible joint upon which the bed hung was a contrivance of folding iron straps that really brought the point of support much further front at the head than they seemed to, thereby overcoming the gravity of the headpiece, and tending to pitch it forward. The bed, when sufficiently loaded, would bring the center of gravity of the upright headpiece so far outside its base, or so nearly so, that any unusual disturbance might work that result, especially when the casters were turned under.

"In the sale of chattels by the manufacturer from specific uses, an implied warranty arises that the article is fit for the use intended."

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[16] Compare Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163 (1860). The action was upon a promissory note, and it appeared that the note was given for the purchase price of certain saws manufactured by the plaintiffs and sold to the defendant, one of which, through defective material or want of being properly tempered, was so soft as to be entirely useless. Selden, J., said: "* * * In the present case, a portion of the alleged defect in the saw would seem to have arisen from the unsuitableness of the material of which it was made. The rule on the subject, I hold to be this: The vendor is liable, in such cases, for any latent defect not disclosed to the purchaser, arising from the manner in which the article was manufactured; and if he, knowingly, uses improper materials, he is liable for that also; but not for any latent defect in the material which he is not shown and cannot be presumed to have known. * * *"

Downing v. Dearborn, 77 Me. 457, 1 Atl. 407. In the sale of chattels without express warranty and without fraud, caveat emptor applies, and there is no implied warranty. Briggs v. Hunton, 87 Me. 145, 32 Atl. 794, 47 Am. St. Rep. 318; Kingsbury v. Taylor, 29 Me. 508, 50 Am. Dec. 607; Winsor v. Lombard, 18 Pick. (Mass.) 57; Mixer v. Coburn, 11 Metc. (Mass.) 559, 45 Am. Dec. 230; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Howard v. Emerson, 110 Mass. 320, 14 Am. Rep. 608. If the sale be by description, without opportunity for inspection, the description must be met.

The sale of this bed was with full opportunity of inspection. It was shown to the purchaser, and the terms of sale were put in writing. She therefore took no implied warranty, or an equivalent right, unless facts were concealed from her that made the transaction fraudulent. No concealment is shown. It does not appear that the defendants knew of the dangerous contrivance that operated the bed. They deny such knowledge. But it is said that, after the sale, the bed broke down; that the defendants were called upon to take it back; and that they said they would fix it, and warrant it all right. One of the iron straps had broken, and the defendants put on a new one. The defendants were neither bound to repair the bed nor take it back. They gratuitously repaired it, and any warranty they might have then made would have been without consideration, and not binding.

But the conversation testified to does not amount to a warranty of its safety in use. At most, it can only be considered an assurance that its mechanism had been made sound. It does not appear that they were then informed of any inherent danger in its use from faulty contrivance. Had they been aware of this, and concealed the danger, and allowed the plaintiff to further use the bed when they knew of its dangerous character, other considerations would arise, not material here. There is no phase of the case as presented that can cast any liability upon the defendants.

The plaintiff asks to amend by inserting a count for the purchase money paid. The amendment could do the plaintiff no good. The bed was bargained on installments. The plaintiff says that, after the shocking disaster with the bed, the defendants demanded payment of money overdue, which being refused, they took the bed. The defendants deny the demand, but say that they retook the bed by plaintiff's consent. In either case, under the terms of sale, they might do so. They have both part payment and the bed. That was their legal right, and a more generous course cannot be demanded by law.

Judgment for defendants.[17]

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[17] Compare Preist v. Last [1903] 2 K. B. 148.

## DAVIS CALYX DRILL CO. v. MALLORY et al.

(Circuit Court of Appeals, Eighth Circuit, 1905. 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973.)

In Error to the Circuit Court of the United States for the Southern District of Iowa.

On June 25, 1902, the Davis Calyx Drill Company, a corporation, made a written contract with S. H. Mallory to furnish him free on board the cars at Tarrytown, in the state of New York, one class F3 drill, which is described in its catalogue, and certain specific machinery, tools, and articles, for which Mallory promised to pay $2,459. Mallory has since died, and the defendants are the executrices of his will. The Calyx Company made and delivered the drill, the machinery, and the articles according to the contract, and this is an action to recover their purchase price. Two defenses were interposed—fraudulent misrepresentation and the breach of an implied warranty by the plaintiff. The court withdrew the former defense, and submitted the latter to the jury. There was evidence which had a tendency to establish these facts:

The plaintiff was a corporation engaged in the manufacture of drills and other machinery at Tarrytown, in the state of New York. Mallory was engaged in prospecting for coal in lands in Lucas county, in the state of Iowa, and William Haven was his agent. Haven had used a diamond drill for this purpose prior to June, 1902, but he objected to it because it would frequently fail to produce any core, for the reason that the coal was soft, and the diameter of the core was only one inch. He was desirous of obtaining a drill which would produce a larger core. He heard of the Davis Calyx drill, procured one of the plaintiff's catalogues, went to Tarrytown, and saw one of the plaintiff's drills in operation with a shot bit; but he could not form any opinion upon the question whether or not it was fit to work in the strata in earth in Lucas county, in the state of Iowa. The drill was provided with a cutter and a shot bit, and these were exchanged in the operation to accommodate the drill to the hardness of the material through which it was to pass. Haven met the secretary and the general manager of the plaintiff. He described to them the strata through which a drill must pass in boring holes upon the land of Mr. Mallory, and explained to them that he desired to get a machine which would produce a larger core than a diamond drill, and would operate as economically and rapidly. They told him that their machine was just the drill he wanted. They showed him pieces of stone through which it had passed, and stated to him that it would sink 25 or 30 feet per day; that it would operate as economically and as rapidly as a diamond drill, and would get a larger core. Thereupon Haven made the contract in suit on behalf of his principal, Mallory, in reliance upon these representations, and upon the judgment of the officers of the plaintiff, expressed in this way. The plaintiff furnished the drill and all the other specific machinery, tools, and articles described in the contract, and furnished an expert to set up and operate the drill. But the machine would not work satisfactorily. It would sink only 8 or 10 feet per day on the average, while a diamond drill would bore into the same ground at the rate of 25 feet per day.

The plaintiff claimed that these facts evidenced an implied warranty that the drill would be fit and suitable to bore holes through the strata in Lucas county, Iowa, underneath his land, as rapidly and economically as a diamond drill. All the testimony relative to this alleged warranty was received over the objections of the plaintiff, and was contradicted by testimony which it produced. The court instructed the jury, in effect, that if Haven correctly described to the secretary and general manager of the plaintiff the strata through which the drill was to be sunk under the land of Mallory, and if the secretary and general manager knew where the drill was to be used, and stated that it would do as much work there, and do it as economically, as a diamond drill, then the plaintiff had made an implied warranty that the drill would work in this way, and that, if it did not do so, the defendants had a right to rescind the contract, to return the drill, and to recover the expenses which they or their decedent had incurred in the attempt to operate it. The plaintiff excepted to this portion of the charge, and to the introduction of the evidence relative to the alleged warranty, and there was a verdict for the defendants.

Sanborn, Circuit Judge, after stating the case as above, delivered the opinion of the court.

An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to make or supply it to accomplish that purpose, because the accomplishment of the purpose is the essence of the undertaking. But no such warranty arises out of a contract to make or supply a specific, described, or definite article, although the manufacturer or dealer knows that the vendee buys it to accomplish a specific purpose, because the essence of this contract is the furnishing of the specific article, and not the accomplishment of the purpose. In other words, a warranty that a machine, tool, or article sold is fit and suitable to accomplish a particular purpose or to do a specific work may be implied when the manufacturer or dealer knows the purpose or work to be effected, and the purchase of the machine, tool, or article is in reality an employment of the vendor to do the work by making or furnishing a machine, tool, or article to effect it. Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 3 Sup. Ct. 537, 28 L. Ed. 86; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Leopold v. Van Kirk, 27 Wis. 152, 156; Brenton v. Davis, 8 Blackf. (Ind.) 318, 44 Am. Dec. 769; Omaha Coal, etc., Co. v. Fay, 37 Neb.

68, 75, 55 N. W. 211; Lee v. Sickles Saddlery Co., 38 Mo. App. 201, 205; Rodgers & Co. v. Niles & Co., 11 Ohio St. 53, 57, 78 Am. Dec. 290; White v. Adams, 77 Iowa, 295, 297, 42 N. W. 199.

But no implied warranty that a machine, tool or article is suitable to accomplish a particular purpose or to do a specific work arises where the vendor orders of the manufacturer, or purchases of the dealer, a specific, described, or definite machine, tool, or article, although the vendor knows the purpose or work which the purchaser intends to accomplish with it and assures him that it will effect it. Such an assurance is but the expression of an opinion, when it is followed by a written contract, complete in itself, which is silent upon the subject. The extent of the implied warranty in such a case is that the machine, tool, or article shall correspond with the description or exemplar, and that it shall be suitable to perform the ordinary work which the described machine is made to do. Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 518–519, 12 Sup. Ct. 46, 35 L. Ed. 837; Keates v. Cadogan, 2 E. L. & E. 320, 10 C. B. 591; Grand Ave. Hotel Co. v. Wharton, 24 C. C. A. 441, 443, 79 Fed. 43, 45; Morris v. Bradley Fertilizer Co., 64 Fed. 55, 56, 12 C. C. A. 34, 35; Leake on Contracts (4th Ed.) 261, 262; 1 Parsons on Contracts, 586, 587; Union Selling Co. v. Jones, 128 Fed. 672, 675, 677, 63 C. C. A. 224, 227, 229; McCray Refrigerating, etc., Co. v. Woods, 99 Mich. 269, 58 N. W. 320, 321, 41 Am. St. Rep. 599; Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 360; Goulds v. Brophy, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; Wisconsin Red Pressed Brick Co. v. Hood, 54 Minn. 545, 56 N. W. 165; Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113; Wheaton Roller Mill Co. v. John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854, 855; Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33; Case Plow Works v. Niles, Scott & Co., 90 Wis. 590, 63 N. W. 1013; Deming v. Foster, 42 N. H. 165, 175; Morse v. Union Stockyard Co., 21 Or. 289, 28 Pac. 2, 3, 14 L. R. A. 157; Dushane v. Benedict, 120 U. S. 630, 647, 7 Sup. Ct. 696, 30 L. Ed. 810; Carleton v. Jenks, 80 Fed. 937, 26 C. C. A. 265; Checkrower Co. v. Bradley & Co., 105 Iowa, 537, 546, 75 N. W. 369; Latham v. Shipley, 86 Iowa, 543, 53 N. W. 342; Blackmore v. Fairbanks, Morse & Co., 79 Iowa, 289, 44 N. W. 548; Parsons Band-Cutter, etc., Co. v. Mallinger, 122 Iowa, 703, 98 N. W. 580.

If the purchaser, Mallory, or his agent, Haven, had described the strata through which he desired to drive the drill, and had ordered the Calyx Company to make or to select and furnish to him a drill that would bore the desired holes through these strata as rapidly and economically as a diamond drill, for an agreed price, and the plaintiff had accepted the order, an implied warranty would have arisen that the drill to be furnished under that contract would do the work as speedily and cheaply as a diamond drill. But an accepted order to make and deliver a specific, described drill, which the vendor is engaged in making, has no such effect, although the manufacturer knows the use for which the vendee desires to obtain it. The reason for this rule is conclusive and unanswerable. When a manufacturer or dealer agrees to make or furnish an article that will accomplish a particular purpose, the accomplishment of the purpose is the substance of his undertaking, and he is free to make or to supply any article that will do the work required. If he furnishes an article that will accomplish this purpose, he performs his contract, although the article he supplies may differ widely from that contemplated by the purchaser when he made the agreement to buy. On the other hand, when the manufacturer or dealer contracts to make or to deliver a specific and definitely described article, to enable the vendor to accomplish a known purpose, the essential part of his obligation is the delivery of the identical article described in the contract; and the delivery of a different article, although it may better accomplish the desired result, is not a performance of his agreement, and does not entitled him to recover the purchase price. The furnishing of the article described, and that alone, whether that article is fit for the known purpose to which the vendee intends to apply it or not, constitutes a compliance with the contract by the vendor, and entitles him to secure its fruits.

The familiar illustration of this distinction by Maule, J., in Keates v. Cadogan, 2 Eng. Law & Eq. Rep. 320, 10 C. B. 591, is still the most felicitous: "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable."

In Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 3 Sup. Ct. 537, 28 L. Ed. 86, the bridge company had erected a portion of the falsework requisite for the construction of a bridge across the Maumee river. Hamilton made a contract with the company to purchase the falsework, the foundation of which was concealed by the river, and to complete the bridge. While he was engaged in the performance of this contract, the falsework gave way, by reason of defects in its construction, and precipitated the iron upon it into the river. The Supreme Court held that the bridge company impliedly warranted that the work which it sold to Hamilton was suitable to construct the bridge upon because it built this falsework, and had sold it to Hamilton to accomplish that specific purpose.[18]

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[18] In this case Mr. Justice Harlan said: "According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore, having no special or technical knowledge of the mode in which it was

But in Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 512, 519, 12 Sup. Ct. 46, 35 L. Ed. 837, the refrigerating company had been informed before it made its agreement that Seitz was cooling his brewery with ice, that he wanted to dispense with the use of ice, that no machine would be of any value to him unless it would enable him to accomplish this result, and that such a machine must continuously cool 150,000 cubic feet of air to a temperature of 40° Fahrenheit. Thereupon the refrigerating company assured Seitz that its machine would accomplish this result, and, in reliance upon this statement, he entered into a written contract with the company to the effect that the latter should supply and put in operation in his brewery a No. 2 size refrigerating machine, as constructed by it, for the sum of $9,450. The company made and put such a machine in his brewery, but it did not work satisfactorily, and it was incapable of cooling 150,000 cubic feet of air to 40° Fahrenheit. The Supreme Court held that this case fell under the rule that "where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer," and that there was neither an expressed nor an implied warranty that the ice machine would do the work for which the manufacturer knew that it was purchased, or that it would cool 150,000 cubic feet of atmosphere to 40° Fahrenheit or to any other temperature.

This decision indicates the unavoidable conclusion in the case at bar. It also answers the contention of counsel that this case is not governed by the rule that there is no implied warranty of fitness where a known, definite, and described thing is purchased, because Mallory and Haven were not familiar with, and had had no ex-

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made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed the seller at the time being informed of the purpose to devote it to that use."

perience in the operation of, the class F3 drill which they purchased. It is not the familiarity of the purchaser with the character and work of the machine ordered, but the identity of the thing described in the contract, which brings the latter within the rule. Seitz was probably ignorant of the character and of the operation of the No. 2 size refrigerating machine which he bought, and he relied upon the assurance of the vendor that it would cool his brewery as he desired. But the machine which he ordered was identified by the description in his contract, and that description made it a known, described, and definite thing. So in the case at bar the description in the accepted order which Haven made of the class F3 drill perfectly identified it —made it a known, described, and definite thing, within the meaning of this rule, and brought the contract clearly under its operation.

In Grand Avenue Hotel Co. v. Wharton, 24 C. C. A. 441, 443, 79 Fed. 43, 45, the vendee ordered two boilers for use in its hotel. The vendor knew the use to which the vendee intended to put the articles, and knew that it must necessarily use the muddy water of the Missouri river in order to operate them. The boilers were furnished, but they would not operate with the water of the Missouri river. This court held that there was no implied warranty that they would do so, and sustained the judgment for their purchase price.

In Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. 232, 234, 41 Am. St. Rep. 33, the purchaser informed the manufacturer before he made his order that he required a boiler that would produce 130 pounds steam, working pressure, and thereupon the latter offered to furnish a described boiler, and he accepted the offer. The boiler specified was furnished, but it failed to produce 130 pounds steam, working pressure, or to do the work for which the manufacturer knew the purchaser ordered it. The Supreme Court of Wisconsin decided that there was no implied warranty that it would accomplish the particular purpose for which it was bought, and said: "The distinction seems to be between the manufacture or supply of an article to satisfy a required purpose, and the manufacture or supply of a specified, described, and defined article, as in this case."

In Goulds v. Brophy, 42 Minn. 109, 112, 43 N. W. 834, 835, 6 L. R. A. 392, the vendee ordered from the catalogue of the manufacturer an auger outfit to bore wells. The vendor furnished the outfit, but it was not suitable to bore the wells which the vendee desired to sink. The Supreme Court of Minnesota held that there was no implied warranty that it would do so, and said: "There was an implied warranty—or, more correctly speaking, condition of the contract—that it should conform to the description, and be of good material and workmanship according to that description, but none that it should answer the purpose described or supposed."

There are many authorities to the same effect, but it would be a work of supererogation to review them. The contract of the Calyx

Drill Company in this case was expressed in writing. It was that it would make and deliver to the purchaser, Mallory, one class F3 drill, and certain other machines and articles, which were definitely specified in the contract. When it supplied these articles, it performed its agreement, whether they were suitable to perform the specific work of boring holes in the land controlled by the vendee in Lucas county, Iowa, or not. There is no averment or proof that they were not fit to accomplish the general purpose for which they were made—to bore holes in the earth under ordinary circumstances. The contract of the Calyx Drill Company was not that it would make and deliver a drill which would sink holes in the ground of the vendee in Lucas county as rapidly and economically as a diamond drill; and, if it had made and delivered a drill which would have done this, it would have been required, if the testimony of the defendants is true, to have furnished a different drill and different machinery from that described in its contract, and in so doing it would have failed to perform it.

The reception of the evidence and the charge of the court upon this subject were erroneous (1) because there was no implied warranty that the drill and machinery would be fit to bore holes through the specific strata in the earth in Lucas county; and (2) because, if there had been such a warranty, it would not have included a covenant that the machinery would sink them as rapidly and economically as a diamond drill. Such a covenant could be imported into the contract only by an express agreement, and such an agreement was excluded by the fact that the contract is in writing, and by the rule that, where the written contract of the paries is complete in itself, the conclusive legal presumption is that it embodies the entire engagement of the parties, and the manner and extent of their obligations, so that parol evidence of other terms is inadmissible to extend, modify, or contradict it. Green v. Chicago & N. W. Ry. Co., 35 C. C. A. 68, 71, 92 Fed. 873, 877; McKinley v. Williams, 20 C. C. A. 312, 319, 74 Fed. 94, 101; Wilson v. New U. S. Ranch Co., 20 C. C. A. 244, 249, 73 Fed. 994, 999; Union Selling Co. v. Jones, 63 C. C. A. 224, 227, 128 Fed. 672, 675.

The judgment is accordingly reversed, and the case is remanded to the court below, with instructions to grant a new trial.[19]

## JAMES DRUMMOND & SONS v. E. H. VAN INGEN & CO.

(House of Lords, 1887. 12 App. Cas. 284.)

Action for the price of goods. Counter-claim for damages on the ground that the goods were not merchantable. An order having been made for the trial of certain preliminary issues in fact by Day, J., without a jury before any of the other questions of fact, that learned judge made certain findings, which were affirmed by the Court of Appeals. From the decision the present appeal was brought.[20]

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[19] A dissenting opinion was delivered by Philips, District Judge.

Lord HERSCHELL. * * * The plaintiffs were manufacturers at Bradford; the defendants were merchants dealing in woollen and worsted cloths, carrying on business in Huddersfield and New York.

The order for the goods in respect of which the present litigation has arisen was given by the defendants to the plaintiffs in 1883. The goods ordered were described as "worsted coatings," and they were to correspond in quality and weight with patterns which had been supplied by the plaintiffs. They were of a description known in the trade as "corkscrew," having the warp on either side and the weft not exposed to view. The goods, when delivered, were shipped to the United States, and sold by the defendants to various purchasers there. It turned out, as I think the evidence establishes, that owing to the mode of manufacture there was a great tendency in the warp to slip, and this to so serious an extent that when made into garments in the ordinary manner the seams gave way with no more than ordinary tension, and the braid became detached from the cloth. In consequence of this defect many purchasers from the defendants returned the goods to them, or compelled them to make allowances, for which they sought compensation by counterclaim in the present action.

It is important to observe that the contract for 1883 was not the first dealing between the parties. The defendants had purchased of the plaintiffs a quantity of "corkscrew" worsted coatings in the previous year, and I cannot see any evidence in the correspondence which passed, or in the oral communications, to shew that it was intended by either of the parties to the contract of 1883 that the goods should be of a different character to those of the previous year in any particular material to the controversy which has to be determined in this action. It is true that the purchasers desired goods of a somewhat softer "handle"; but I think it is abundantly clear on the evidence that this was a matter of "finish," and that it was not the endeavour to give a softer "handle" which led to the defect of excessive slipping.

I have said that the goods were, by the order, to conform to certain patterns supplied by the plaintiffs to the defendants, and approved of by them. There is no doubt that the bulk of the goods corresponded in every particular with these patterns; and this, the plaintiffs allege, is a complete answer to the defendants' claim. The tendency to slip is not, they insist, properly to be called a defect but a characteristic of the manufactured article, which existed in the sample just as much as in the bulk of the goods. I do not think it is very material what name is given to it; but I confess it strikes me that a characteristic arising from a particular mode of manufacture which renders the manufactured article less useful for the purpose for which such an article is ordinarily used, without, as far as appears, any counterbalancing advantage, may well be called a defect.

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[20] The statement of the case is abbreviated, and part of the opinion is omitted.

I think it is proved by the evidence that this defect existed to such an extent that the worsted coatings could not be used for the purpose of being made into coats in the manner usual with goods of the same general description and quality, and that they could only be made into garments capable of resisting ordinary tension by the adoption of special precautions both in regard to breadth of seam and method of sewing. The question arises whether, in these circumstances, the plaintiffs have complied with their contract by delivering coatings precisely corresponding in quality and weight with the patterns, or whether they are liable to the defendants.

Let me consider, first, how the case would have stood if no samples had been supplied. Suppose the defendants had simply ordered worsted coatings similar to those they had purchased in the previous year, but with a difference of colour, design, and handle. Could the plaintiffs have justified supplying under such an order coatings such as those which have given rise to this litigation? It is true that the purpose for which the goods were required was not, as in Jones v. Bright, 5 Bing. 533, stated in express terms, but it was indicated by the very designation of the goods, "coatings." I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used. I think too that where the article does not comply with such a warranty it may properly be said to be unmerchantable in the sense in which that word is used in relation to transactions of this nature.

It was urged for the appellants by the Attorney-General, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognisant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials. But no such question arises here. There seems nothing unreasonable in expecting that the maker of "coatings" should know that they are to be turned into coats and other garments, and that he should further know what coatings will and what will not be capable of use for this purpose in the ordinary methods.

It seems to me not open to doubt that in the case which I have supposed the manufacturer would be liable. Does it then make any difference that the plaintiffs furnished patterns which were approved of by the defendants, and that the goods delivered were in complete conformity with their patterns? Except upon the assumption (with which I will deal presently) that the patterns ought to have conveyed to the defendants knowledge of the defect of which they complain, I cannot think that it does.

When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty.

I adopt what was said by Willes, J., in Mody v. Gregson, Law Rep. 4 Ex. 49, 53: "The object and use of either inspection of bulk or sample alike are to give information, disclosing directly through the senses what any amount of circumlocution might fail to express. It seems difficult, therefore, to ascribe any greater effect to a sample in excluding implication than would be ascribed to express words in the contract giving, as far as words could give, the same amount of information; and as to such words, the doctrine that an express provision excludes implication, does not affect cases in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer."

There is no doubt that the implied warranty will be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience. The inquiry, therefore, arises whether the defendants by "due diligence in the use of all ordinary and usual means" would have detected in the patterns the defects of which they now complain. I think not. What is "due diligence" must depend upon the circumstances. Having regard to the order given in the previous year, and the mode in which that order was fulfilled, I think that when the defendants made the contract there was nothing which could reasonably lead them to anticipate that the patterns represented goods possessing the defect which was, in fact, inherent in them. And I am satisfied upon the evidence that the defendants who, undoubtedly, did not discern the defect, did not fail to do so from neglecting to use the means usually adopted by buyers under like circumstances.

I have therefore arrived at the conclusion that the learned judge who tried the case tok a correct view of the facts on this part of it, and that his decision was properly affirmed by the Court of Appeal. * * *

Order appealed from affirmed; and appeal dismissed with costs.[21]

## FARRELL v. MANHATTAN MARKET CO. (three cases).

(Supreme Judicial Court of Massachusetts, 1908. 198 Mass. 271, 84 N. E. 481, 15 L. R. A. [N. S.] 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076.)

LORING, J.[22] These cases come up on an exception to a ruling directing a verdict for the defendant.

The plaintiff in the third case (whom we shall speak of as the plaintiff) was the mother of those in the other two. The defendant is a corporation engaged in carrying on a retail market and provision store. The jury were warranted in finding the following to be the facts in the case:

On a Saturday evening in July the plaintiff, in the words of the bill of exceptions, "purchased a chicken from one of the salesmen" of the defendant. She asked the salesman if it was a cold storage fowl, and he answered: "Don't you know a good thing when you see it? Its strictly fresh." She paid 12½ cents a pound, the price "having been reduced from 25 cents per pound, which was the defendant's custom on Saturday night in several of its departments."

The next morning at 10 o'clock she removed the entrails, washed the fowl, wiped, boiled and then roasted it, and at 4 o'clock she and the other two plaintiffs ate a portion of it and were made sick; what they suffered from was ptomaine poisoning. * * *

At the conclusion of the evidence the plaintiffs requested the judge to rule "that a retail dealer in provisions selling chicken under the circumstances in this case impliedly warranted the chicken fit for food," also "that it was a question of fact for the jury to say whether or not the chicken was fit for food, whether or not the plaintiffs were injured by eating of diseased chicken, and whether or not the defendant was negligent in failure to make a sufficient and proper examination of the chicken before selling it to the plaintiff for consumption." The presiding judge "declined to give the plaintiffs' requests, saying that he did not feel called upon to make such ruling, and ruled that there was not sufficient evidence that would warrant the jury in finding a verdict for the plaintiffs, and ordered a verdict for the defendant in all three cases."

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[21] Concurring opinions were delivered by the Earl of Selborne and Lord Macnaghten.

For a case in which, although samples were exhibited and examined, it was held that there was no warranty that the bulk should correspond with the samples, see Gunther v. Atwell, 19 Md. 157 (1862).

[22] The statement of facts and part of the opinion are omitted.

1. It was held in Norton v. Doherty, 3 Gray, 372, 63 Am. Dec. 758, on the authority of Williamson v. Allison, 2 East, 446, that tort for a false warranty as well as an action of contract lies in case a chattel is sold with warranty and the warranty is broken. A number of earlier English cases to the same effect are collected by Holmes, J., in Nash v. Minnesota Title Ins. Co., 163 Mass. 574, 587, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489, and the proposition is there repeated. To the same effect see Emmons v. Alvord, 177 Mass. 466, 470, 59 N. E. 126, and Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 237, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478. In tort for a false warranty, the scienter need not be alleged, and if alleged it need not be proved. Shaw, C. J., in Norton v. Doherty, 3 Gray, 372, 373, 63 Am. Dec. 758; Holmes, C. J., in Nash v. Minnesota Title Ins. Co. and Emmons v. Alvord, ubi supra.

We assume therefore that an action of tort may be maintained for breach of a warranty. In the case at bar the plaintiff has alleged that the defendants sold the fowl to the plaintiff with the implied warranty that it was fit for food. The principal question in the case is whether that allegation has been made out.

In Howard v. Emerson, 110 Mass. 320, 14 Am. Rep. 608, it was decided that in the sale of a cow by a farmer to a butcher to be cut up for meat there was no implied warranty that it was fit for that purpose. After stating the general rule to be that in a sale of goods the maxim caveat emptor applies and that the defendant contended that articles of food sold for immediate domestic use are an exception, Morton, J., said: "But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use."

Giroux v. Stedman, 145 Mass. 439, 14 N. E. 538, 1 Am. St. Rep. 472, was a similar decision. There the defendants, who were farmers, killed two hogs and sold them to the plaintiffs to be eaten. The presiding judge instructed the jury as to the general rule laid down in Howard v. Emerson; next he told them that there was an exception in case of the sale of provisions by a dealer (although that had been left open in Howard v. Emerson), but he added that that exception did not apply to a sale by a farmer, and left the case to the jury on the defendants' knowledge of the condition of the hogs. In disposing of an exception to this instruction Devens, J., said: "Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, contended that the defendants were brought within it."

It becomes necessary in the base at bar to consider the question left open in these two cases, and to decide whether there is such an exception to the general rule which obtains in the sale of chattels.

A case of first importance on this subject is Bigge v. Parkinson, 7 H. & N. 955, decided by the Exchequer Chamber in 1862.

Before that case was decided the law on the subject was not in a satisfactory condition. It was laid down in a number of cases in the year books, collected in Burnby v. Bollett, 16 M. & W. 644, that the keeper of a tavern is liable for furnishing bad food or bad wine to his guests. The case in Year Book 9 Henry VI, 53, may be taken as an example. It is there said: "If I come into a tavern to eat and he gives and sells to me beer and flesh which are corrupt by which I am put into a great sickness, I shall have against him my action on the case clearly, even although he made no guaranty to me." Mr. Justice Blackstone had laid it down without citing any authorities that: "In contracts for provisions it is always implied that they are wholesome." 3 Bl. Com. 165.

In Burnby v. Bollett, 16 M. & W. 644 (decided in 1847), it had been decided that in the sale of the carcass of a pig by one not a dealer where the carcass was inspected by the buyer, there was no implied warranty of soundness. Parke, B., in delivering the opinion of the Court of Exchequer in that case suggested that the cases in the year books depended on statutes repealed before the sale then in question making it an offense for victualers, butchers and other common dealers in victuals to sell corrupt victuals.

In Emmerton v. Mathews, decided by the Court of Exchequer in the same year and reported in the same volume (7 H. & N. 586) as Bigge v. Parkinson, it was held that in the sale of a carcass of meat by one who sold meat on commission for his consignors there was no implied warranty of soundness. This case, as reported in 7 H. & N. 586, would seem to go on the ground that one who sells meat as a factor for others is not a dealer. But in the report in 5 L. T. (N. S.) 681, Pollock, C. B., is reported to have said that "the plaintiff bought on his own inspection," and in Jones v. Just, L. R. 3 Q. B. 197, 202. The decision in Emmerton v. Mathews was stated to have been made on the ground that the plaintiff selected the meat.

This was the state of the law on the subject when Bigge v. Parkinson came up for decision. Bigge v. Parkinson was a case where the plaintiffs, being ship owners, had chartered a ship to the East India Company to carry troops from London to Bombay. They had made a contract with the defendant, who was a provision merchant, by which the defendant agreed to supply the ship with provisions and stores for the troops at so much a head. Under this contract the defendant had supplied provisions and stores which were unsound and unwholesome, and it was held that he was liable on an implied warranty that the provisions and stores supplied should be fit to be eaten.

The ground on which this conclusion was reached is thus stated by Cockburn, C. J., who delivered the opinion of the Court of Exchequer Chamber after time had been taken for consideration: "The principle of law is correctly stated in the passage cited from Chitty on Contracts (6th Ed.) p. 399. Where a buyer buys a specific article, the maxim 'Caveat emptor' applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions."

The rule thus laid down by Cockburn, C. J., in Bigge v. Parkinson, has been followed in all subsequent cases and is now established as the law in England on the question now before us.

The first proposition laid down in Bigge v. Parkinson is that there is no difference between a sale of provisions and the sale of other articles in respect to there being or not being an implied warranty that they are fit. In his opinion in Bigge v. Parkinson Chief Justice Cockburn first states the general rule that caveat emptor applies where a person buys a specific article; he then states that where goods (not articles of food) are supplied under a contract and the buyer trusts to the judgment of the seller to select the goods, there is an implied warranty of fitness; he then decides that these rules apply to a contract to supply provisions. Since the decision in Bigge v. Parkinson the question of an implied warranty of wholesomeness in the sale of provisions always has been treated as a question to be determined by the application of the rules which obtain in case of the sale of other chattels, and not as an exception. See to that effect Chalmers, Sale of Goods Act (1893), 32. See, also, for example, Mellor, J., in the leading case of Jones v. Just, L. R. 3 Q. B. 197, 202; FitzGibbons, L. J., in Wallis v. Russell [1902] 2 I. R. 585, 612.

The second proposition laid down in Bigge v. Parkinson is that the rule which makes a dealer liable for selling unsound provisions is the rule which is applied where a chattel (no matter what kind of chattel it may be) is ordered of a manufacturer or dealer for a particular purpose. In such a case there is an implied warranty that the article furnished will be fit for the particular purpose. It was settled before Bigge v. Parkinson was decided that this rule applied to dealers as well as to manufacturers. Jones v. Bright, 5 Bing. 533; Gardiner v. Gray, 4 Camp. 144. * * *

There is one difference between a contract with a dealer to supply ordinary articles and a contract with a dealer to supply food: In a contract with a dealer to supply food it is not necessary to state to the dealer that the food is to be eaten. That goes without saying. A contract for the supply of food without stating the purpose for which the food is required stands on the same footing as a contract to supply other articles when the particular purpose for which they are wanted has been stated to the dealer.

Bigge v. Parkinson was a case where goods were supplied under a pre-existing contract. But there is no difference between a dealer's supplying provisions under a contract previously made and a dealer's supplying provisions in response to an order to be accepted by shipping the provisions. The material fact is that the purchaser makes known to the seller that he relies on his skill and judgment in selecting the provisions ordered. Beer v. Walker, 37 L. T. (N. S.) C. P. 278, decided before the sale of goods act, and Burrows v. Smith, 10 Times R. 246, decided since that act was passed, were cases of orders. To the same effect see Grove, J., in Smith v. Baker, 40 L. T. (N. S.) 261, 263.

Finally, provisions may be ordered by the purchaser in person in the dealer's shop, in such a way that it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, and if they are so ordered he is liable if they are not fit to be eaten. That was decided in Wallis v. Russell, [1902] 2 I. R. 585. In that case the plaintiff sent her granddaughter to buy two nice fresh crabs for tea. The granddaughter went to the defendant, a dealer, and delivered the message. The defendant's assistant selected two. Thereupon the granddaughter, pointing to a third crab, asked the assistant if he did not think that it was a better one. The assistant took it up, felt it, said it was by the weight one should judge and not the size, and put it aside. The granddaughter testified that she relied altogether on the assistant's judgment. In answer to a question put by the presiding judge the jury found that the plaintiff, through the granddaughter, relied on the defendant's assistant to select fresh and reasonably fit crabs. They also found that the plaintiff, through the granddaughter, had an opportunity to examine the crabs at the time of the sale and that the defendant honestly believed that the crabs were fresh and fit for food. There was no contention that the defendant was negligent, and on the facts such a contention would have been futile. The plaintiff and her granddaughter ate the crabs and were both made violently ill. In an action brought by the plaintiff it was held by the High Court of Justice and on appeal by the Court of Appeal for Ireland that she could recover. This case arose under the sale of goods act. But not only is that act as a whole a codification of the law as it existed before, but the subsection in question (subsection 1 of section 14) is in substance and almost in terms the fourth rule laid down by Mellor, J., in Jones v. Just, L. R. 3 Q. B. 197, 202, 203. If the purchaser who goes in person to the provision store in fact gives his order in such a way that he leaves the selection of the food to the seller's skill and judgment, we have a case which stands on the same footing as those where provisions are supplied under a previous contract or are shipped in pursuance of a written order.

The rule now established in England is that in the sale of an article of food by one not a dealer there is no implied condition or warranty that it is fit to be eaten. Burnby v. Bollett, 16 M. & W. 644; Emmerton v. Mathews, 7 H. & N. 586; Smith v. Baker, 40

L. T. (N. S.) 261; Cockburn, C. J., in Bigge v. Parkinson, 7 H. & N. 955. These are all of them cases decided before the sale of goods act. Since the sale of goods act, if the sale is made by one not a dealer there is no liability, by force of section 14. If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract (Bigge v. Parkinson, 7 H. & N. 955), or in response to an order not given in person (Beer v. Walker, 37 L. T. [N. S.] C. P. 278; Burrows v. Smith, 10 Times R. 246; Grove, J., in Smith v. Baker, 40 L. T. [N. S.] 261, 263), or even when the order is given in person in the dealer's shop, provided, as we have said, that the selection is left to the dealer (Wallis v. Russell [1902] 2 I. R. 585). But even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule applies and the dealer is not liable (in the absence of knowledge by the dealer that the provisions are unsound) if the provisions are not fit for food. Mellor, J., in Jones v. Just, 3 Q. B. 197, 202; Emmerton v. Mathews, 5 L. T. (N. S.) 681, and as interpreted by Mellor, J., ubi supra; Cockburn, C. J., in Bigge v. Parkinson, 7 H. & N. 955, before the sale of goods act. Under the sale of goods act this is so by force of section 14 because the case does not come within any of the subsections. * * *

We are of opinion that the rule stated above now established in England is the true rule as to when there is an implied term or condition of soundness in the sale of food.

We are also of opinion that offering food for sale is in itself a representation that it is believed to be sound, and that where there is no implied term or condition of soundness the defendant is not liable unless he knew of the fact that the food sold was not fit to be eaten.

Coming to the case at bar and to the allegation in the declaration that the fowl here in question was sold with an implied warranty that it was fit for food: To prove that allegation the burden was on the plaintiff to prove that in making the purchase here in question she relied on the skill and judgment of the defendant's servant in selecting the fowl. In other words, the burden is on her to make out that the purchase of the fowl in the case at bar was not the purchase of a specific chattel and that it was a purchase of the same kind as is a purchase where food is shipped under a previous contract or in fulfillment of an order (that is to say, where the buyer relies on the seller's skill and judgment).

It is enough to dispose of this case to say that the plaintiff did not sustain the burden of proof on that issue. The evidence did not disclose how or by whom the fowl was selected; all that is stated on that point is that "the plaintiff Mary Farrell went to the defendant's store at about 9:15 p. m. on Saturday, July 1, 1905, and purchased a chicken from one of the salesmen." Moreover, so far as the evidence went, it showed that in offering the fowls from which the one in question was selected the defendant did not offer to exercise his skill and judgment in supplying sound food. The fowl in question was bought from those exhibited on a Saturday night in July, by the defendant, on a bargain counter, to be sold at 50 cents on the dollar. It is manifest that the defendant offered this meat for sale to avoid carrying it over Sunday in hot weather, and it is a fair inference that like all articles on a bargain counter the selection was to be made by the buyer. See in this connection the statement of Sewall, J., in Emerson v. Brigham, 10 Mass. 197, 201, 6 Am. Dec. 109: "The difference is that in the case of provisions the artifice is proved, when a victualer sells meat as fresh to his customers at a sound price." * * *

The result is that the exceptions must be overruled. So ordered.[23]

## SECTION 4.—DELIVERY AND PAYMENT

### JANNEY et al. v. SLEEPER.

(Supreme Court of Minnesota, 1883. 30 Minn. 473, 16 N. W. 365.)

This action was brought in the municipal court of Minneapolis, to recover the price of glass alleged to have been sold and delivered to defendant in Minneapolis. The answer sets up as a defence that the contract of sale required a delivery to defendant in Brainerd, and that plaintiffs had failed to make such delivery. Upon the trial, it appeared that the plaintiffs had shipped the glass to defendants by rail, and that it was broken in transit from Minneapolis to Brainerd. Plaintiffs had a verdict, and defendant appeals from the judgment entered thereon.

Mitchell, J.[24] * * * 2. The plaintiffs were hardware merchants, whose residence and place of business was in Minneapolis. The defendant resided at Brainerd. The plaintiffs, at their place of business in Minneapolis, agreed to sell and deliver to defendant a quantity of glass. At the time of making the contract, plaintiffs did not have the goods on hand in stock, but had to purchase them in St. Louis in order to meet their contract. The evidence as to the place where the goods were to be delivered to defendant was conflicting; that on the part of plaintiffs tending to prove that they were to be delivered at Minneapolis on the cars, while that on the part of defendant tended to prove that the goods were to be delivered at Brainerd. The court, under the objection and exception of defendant, instructed the jury "that the burden of proof was upon defendant to show by a proponderance of testimony that the glass was to be delivered to him at Brainerd, as he claimed, and not in cars at Minneapolis, as claimed by the plaintiffs." We see no error in this. If no place be designated by the contract, the general rule is that the articles sold are to be delivered where they are at the time of the sale. The store of the merchant, the shop of the manufacturer, and the farm of the farmer, at which the commodities sold are deposited or kept, must be the place of delivery when the contract is silent upon the subject; at least, when there are no circumstances showing that a different place was intended. This is a rule of construction predicated upon the presumed understanding of the parties when making the contract. Benj. Sales, 1018, 1022; 2 Chit. Cont. 1201, 1202; 2 Kent, Comm. 505; Middlesex Co. v. Osgood, 4 Gray (Mass.) 447; Smith v. Gillett, 50 Ill. 290; Hamilton v. Calhoun, 2 Watts (Pa.) 139; Lobdell v. Hopkins, 5 Cow. (N. Y.) 516; Rice v. Churchill, 2 Denio (N. Y.) 145; Wilmouth v. Patton, 2 Bibb (Ky.) 280; Sousely v. Burns, 10 Bush (Ky.) 87.

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[23] As to the liability of a retailer or victualer who furnishes unwholesome canned goods to a consumer, see Bigelow v. Maine Cent. R. Co. (Me.) 85 Atl. 396 (1912). As to the liability of the manufacturer to a consumer who buys from a retailer, see Tomlinson v. Armour & Co., 74 N. J. Law, 274, 65 Atl. 883 (1907).

[24] Part of the opinion is omitted.

This rule is not changed by the fact that plaintiffs did not have the goods on hand at their place of business at the time of the sale, but had to procure them elsewhere in order to fulfill their contract. Potentially and prospectively the goods were as if then situate in their store at Minneapolis. Hence, in the absence of any evidence as to the place of delivery, it would be presumed to be at Minneapolis. To overcome this presumption some evidence would be required tending to show that some other place was agreed upon. This was, in effect, all that the language of the court implied when he instructed the jury that the burden of proof was upon defendant to show that the goods were to be delivered at Brainerd, and not Minneapolis. * * *

Judgment affirmed.

## CATLIN et al. v. JONES.

(Supreme Court of Oregon, 1906. 48 Or. 158, 85 Pac. 515.)

This is an action to recover damages for the breach of a contract to sell and deliver hops. The complaint alleges that on July 15, 1904, the parties to this action entered into a written contract, by the terms of which the defendant agreed to sell for 14½ cents a pound and deliver to the plaintiffs at Brooks station, on board cars free of all expense, from 13,000 to 15,000 pounds of hops, to be grown during that season in certain specified yards, and to be of the first average quality for the year and section, and to be put up in new baling cloth, delivery and acceptance to be made between the 1st and 10th of October, 1904; that the defendant had of the hops mentioned in the contract 15,000 pounds or thereabouts, produced upon the premises described and of the kind and quality mentioned; that on the 10th of October, 1904, the plaintiffs sent their agent to defendant to ascertain whether he was ready to deliver the hops, but they were not all then baled or in a deliverable condition, and on the 17th of October, the hops being baled and ready for delivery, the plaintiffs tendered the purchase price thereof, and demanded a delivery, but defendant refused to accept the money or deliver the hops to the plaintiffs' damage in the sum of $2,025.

The answer admits the contract as alleged, avers that the hops therein stipulated to be sold by the defendant amounted to 14,086 pounds, and for an affirmative defense alleges that prior to October 1, 1904, the plaintiffs sold, assigned, and transferred all their interest in the contract in question to T. Rosenwald & Co., who have ever since been the owners and holders thereof; that on October 10, 1904, the defendant had at Brooks station the hops mentioned in the complaint, ready for delivery, but that neither Rosenwald nor any one on his behalf was there ready and willing to accept or pay for them; that on the day named defendant was ready and willing to deliver the hops as called for by the contract to the legal owner and holder of such contract, but that there was no one at Brooks to receive the hops or pay for the same on the part of any person whatsoever.

The reply denies the material allegations of the answer and affirmatively alleges that during the year 1904, Rosenwald was a customer of the plaintiffs and they had agreed to sell and deliver to him in October of that year a large quantity of hops; that for the purpose of fulfilling their contract with him, they entered into the agreement with the defendant set out in the complaint and attempted to assign the same to Rosenwald, but when he learned that defendant refused to deliver the hops he declined to accept the assignment and insisted that plaintiffs comply with their agreement, which they were compelled to and did do at great loss and damage to them.

Upon the issues thus joined the case was tried to a jury. It was admitted that the hops in question amounted to 69 bales and weighed 14,086 pounds. The evidence for the plaintiffs tended to show that on October 10, 1904, they sent their agent, Earl Race, to defendant's residence near Brooks to ascertain if the hops were then in a deliverable condition, and to receive them if defendant was ready to deliver; that Race arrived at defendant's place some time after noon and told the defendant that plaintiffs were anxious to receive the hops, and inquired when he would be ready to deliver and he replied "at most any time"; that defendant gave Race a written order permitting him to take samples from the bales of hops which were then in the warehouse at the station at Brooks; that Race went from defendant's residence to Brooks, took samples from the hops then in the warehouse, and remained there until about 4:30 o'clock in the afternoon or thereabouts; that at that time there were only 40-odd bales in the warehouse. The defendant, as a witness in his own behalf, testified that he told Race that he was then ready to deliver the hops to the plaintiffs; that 40-odd bales were in the warehouse at Brooks station on the morning of the 10th of October, and had been for some time previous; that afterward and on that day he caused 29 or 30 bales more to be hauled by his workmen to the warehouse, and placed with the other hops; that he himself was at the warehouse in the forenoon but did not return again that day, and the bill of exceptions recites that there was no evidence "tending to show that defendant or any person authorized by him was at the place when the hops were stored for the purpose of delivering the same to plaintiffs." There was testimony tending to show that all the hops were baled, and in deliverable condition on October 17th and were worth from 30 to 31 cents a pound; and that on that day the plaintiffs demanded the delivery thereof, and tendered to the defendant the purchase price, but that defendant refused to accept the money or make the delivery.

The plaintiffs requested the court to instruct the jury that, "if the defendant did not have the hops at Brooks in time for the plaintiffs to inspect and receive them by daylight, but that he got them there so late that plaintiffs would have had to inspect and receive them after dark or at a time so late in the day that it was not possible to carefully inspect and receive them by the aid of daylight, then the defendant did not comply with that part of the contract which required him to have the hops at Brooks by the 10th day of October, 1904, and his defense on that issue cannot avail him." This instruction was refused, and the cause was thereupon submitted. After the jury had been out for a time they returned into court and inquired whether it was necessary for the defendant to be at the warehouse on October 10th, after the last load of hops had been hauled in order to make a complete delivery. To this inquiry the court replied: "I will say to you that the question presented is not within the pleadings. The plaintiffs have charged in their complaint that the hops were not in a deliverable condition, and that is the only ground that they allege as excusing them from paying or offering to pay the money on the 10th and they must recover on that ground or not at all. The question which you propound has nothing to do with the case under the evidence that they have offered." The verdict was for the defendant, and plaintiffs appeal.

BEAN, C. J. (after stating the facts). By the terms of the contract upon which plaintiffs seek to recover, the payment of the purchase price, and the delivery of the hops were made concurrent acts, to be performed at the same time. The defendant was not bound to deliver the hops until they were paid for, nor were plaintiffs bound to pay for them until delivered. Payment and delivery were to be performed simultaneously. Beauchamp v. Archer, 58 Cal. 431, 41 Am. Rep. 266; Meeker v. Johnson, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148. But, before the plaintiff can recover damages for a breach of the contract, he must show more than the mere default of the defendant. He must show that he was ready and willing to perform his part of the contract by accepting and paying for the hops at the time and place appointed. The hops were to be delivered at a particular place, and if the plaintiffs were ready at the appointed time and place to perform their part of the contract, and the defendant did not have the hops there ready for delivery, the right of action for a breach of the contract was complete without a tender of the purchase price or a demand for the hops. Coonley v. Anderson, 1 Hill (N. Y.) 519; Neis v. Yocum (C. C.) 16 Fed. 168. But if the defendant, as he alleges, had the hops ready for delivery at the time and place specified in the contract, the plaintiffs must show an offer then to receive and pay for them before they can maintain an action for nondelivery.

Now, it is not directly averred in the complaint that plaintiffs were ready and willing at the time and place specified to perform the contract on their part, but this omission is cured by the allegation of the answer that defendant had the hops at Brooks station ready for delivery at a time stipulated, but that there was no one present to receive and pay for them. This averment of the answer is denied by the reply, and an issue thus made on the plaintiffs' readiness and willingness to perform the contract on their part. Consequently the defect in the complaint is cured by the answer. Turner v. Corbett, 9 Or. 79; Chesapeake & Ohio R. Co. v. Thieman, 96 Ky. 507, 29 S. W. 357; Schenck v. Hartford Fire Ins. Co., 71 Cal. 28, 11 Pac. 807; Beckmann v. Phœnix Ins. Co., 49 Mo. App. 604. In an action of this kind, readiness and willingness to perform by the plaintiff, must be alleged in the complaint, or else it will be had on demurrer, but where such allegation is omitted and the defendant in his answer by way of defense sets up nonperformance by the plaintiff of the terms of the contract, and the plaintiff takes issue upon such averment, the defect in the complaint is helped out or aided by the subsequent pleading. This rule is well illustrated in Beckmann v. Phœnix Ins. Co., supra. That was an action on a policy of fire insurance, and the complaint failed to allege that the plaintiff complied with certain conditions precedent to his right of action. The court said the complaint would have been vulnerable to a demurrer, but that the defendant having by way of defense set up the nonperformance of the conditions precedent on the part of the plaintiff, and plaintiff having taken issue by reply, the defect was cured. The same principle is applied in other cases cited.

The questions for determination, therefore, under the pleadings, were (1) whether the plaintiffs were ready and willing at the time and place stipulated to perform the contract on their part by accepting and paying for the hops, and if so (2) whether the defendant was ready and able at that time to comply with the contract by making the delivery. Upon this latter point the instruction requested by the plaintiffs was, in our opinion, correct and should have been given and the inquiry of the jury should have been answered in the affirmative. Where, under the terms of an executory contract of sale, the delivery of bulky articles, such as hops, which require inspection and examination, is to be made at a particular place, tender must be seasonably made so that the vendee, who is bound to attend for the purpose of receiving the property, may have an opportunity to examine and inspect it by daylight to ascertain whether it complies with the contract. 2 Mechem, Sales, § 1137; Croninger v. Crocker, 62 N. Y. 151; Startup v. MacDonald, 46 E. C. L. 591.

The rule upon this subject is thus admirably stated by Baron Parke, in Startup v. MacDonald, supra, "A party who is, by contract, to pay money, or to do a thing transitory, to another, anywhere, on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract. In such a case the party bound must find the other, at his peril, and within the time limited, if the other be within the four seas; and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that, at a convenient time before midnight, such time varying according to the quantum of the payment, or nature of the act to be done. * * * But where the thing to be done is to be performed at a certain place, on or before a certain day, to another party to a contract, there the tender must be to the other party at that place; and as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain; and, therefore, it fixes a particular part of the day for his presence; and it is enough if he be at the place at such a convenient time before sunset on the last day as that the act may be completed by daylight; and if the party bound tender to the party there, if present, or, if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient."

If, therefore, the defendant did not have the hops at Brooks in time for the plaintiffs to inspect them by daylight on the day stipulated for the delivery, he did not comply with his contract and his act is no defense in this case, if in fact the plaintiffs have themselves complied with the contract so as to entitle them to sue the defendant for nondelivery. Nor would the mere transportation of the hops to Brooks station be a defense if the plaintiffs were there ready and willing to accept them, unless the defendant or some one representing him was present to make the delivery and to receive the purchase price. If both parties had been present at the time and place agreed upon and able to perform their respective undertakings, neither could have put the other in default without offering to perform on his part. Davis v. Adams, 18 Ala. 264. It was, therefore, incumbent on the plaintiffs, if they were ready and willing to perform the contract and the defendant was likewise ready, to offer to perform before they could maintain an action for a breach, but they were not bound, as Judge Deady says in Neis v. Yocum, supra, "to go out into the highways and elsewhere to find the seller" to make such offer. It was the duty of the defendant if he desired to perform his contract, to be present at the time and place of performance either in person or by agent so that he could have delivered the hops, and received the pay therefor.

Judgment reversed, and new trial ordered.

## EDWARDS, HUDMON & CO. v. MEADOWS.

(Supreme Court of Alabama, 1881. 71 Ala. 42.)

Action on a promissory note given for a threshing machine sold by the plaintiffs to the defendants, which at the time of the sale was in the possession of one Brooks.[25]

SOMERVILLE, J. Where a vendor makes sale of personal property in the custody of a third person, who is his bailee, and gives a delivery order to the vendee, it has long been settled that this will not amount to a delivery so as to vest the title in the vendee, until the order is presented and such third person agrees to become the bailee of the purchaser, expressly or impliedly. Benj. on Sales, §§ 175, 680; Bentall v. Burn, 3 Barn. & C. 423; Barney v. Brown, 2 Vt. 374, 19 Am. Dec. 720. It is true that where the custodian or bailee assents in advance of the sale to become the bailee of the buyer, this assent might be irrevocable after the sale, and the title would pass. A refusal by the custodian afterwards to deliver would be, not a refusal to become bailee, but to do his duty as such under the previous agreement which constituted him bailee for the purchaser. Benj. on Sales, § 175. So where goods are merely on the premises of a third person, who is not a bailee for the owner, as in the case of one holding tortious possession, delivery may be effected by the vendor's putting the goods at the disposal of the vendee, so as to be, actually or constructively, under the exclusive dominion of the latter. Benj. on Sales, § 178.

Brooks in this case was clearly the bailee of the appellants, the machine sold by them to Meadows being in his possession. The mere giving of the delivery order, without more, did not transfer the title of the property, or amount to a delivery, unless so intended mutually by the parties, and such intention must be evidenced by proper proof, circumstantial or direct. When the order was presented to Brooks, if he had consented to attorn to Meadows so as to become his bailee, the delivery would have been complete.

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[25] The statement of facts is rewritten and part of the opinion is omitted.

And so the delivery could have been waived by the purchaser, if he had voluntarily consented to let Brooks retain the machine until the next day, or for any definite space of time, as an act of free grace or favor from himself. But if Meadows acted under the moral coercion of necessity dictated by the situation, and merely allowed Brooks to continue in custody as the best arrangement he could make under the circumstances, Brooks would not thereby become his bailee, but continued his original custody as bailee of the vendors, Edwards, Hudmon & Co.

In Magee v. Billingsley, 3 Ala. 679, the giving of an order for cotton stored in a warehouse and in a deliverable condition was held prima facie to constitute a delivery. There the warehouseman, however, agreed to attorn to the vendee, and made a memorandum of the purchaser's name on his books in the usual manner of such sales. Custom, too, would probably exert a controlling influence in the case of sales of cotton kept on deposit by warehousemen, especially in large cities, which would take such transactions out of the operation of the ordinary rule governing other classes of bailees and other kinds of property.

The charges of the court in relation to the delivery of the property in controversy were in accordance with these views, and there was no error in them. * * *

## NORRINGTON v. WRIGHT et al.

(Supreme Court of United States, 1885. 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.)

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars ($45.00) per ton of 2240 lbs. custom-house weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

"Edward J. Etting, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract verbatim. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs, at the rate of about 1,000 tons a month, in March, April, May, June, and July. The defendants pleaded non assumpsit. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, they gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th, as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on their being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to

April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10th Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined.

On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments, (designated by the names of the vessels,) had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended (1) that under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month; (2) that, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the court instructed the jury that if the defendants, at the time accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Gray, J. (after stating the facts as above). In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

Behn v. Burness, 3 Best & S. 751; Bowes v. Shand, 2 App. Cas. 455: Lowber v. Bangs, 2 Wall. 728, 17 L. Ed. 768; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. Mersey S. & I. Co. v. Naylor, 9 App. Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances,—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill,—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Brawley v. United States, 96 U. S. 168, 171, 172, 24 L. Ed. 622.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of Hoare v. Rennie, 5 Hurl. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract,—they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action." 5 Hurl. & N. 28. So in Coddington v. Paleologo, L. R. 2 Exch. 193, while there was a division of opinion upon the question whether a contract to supply goods, "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17th, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in Simpson v. Crippin, L. R. 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for 12 months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in Brandt v. Lawrence, 1 Q. B. Div. 344, in which the contract was for the purchase of 4,500 quarters, 10 per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of Bowes v. Shand, after conflicting decisions in the queen's bench division and the court of appeal, was finally determined by the house of lords. 1 Q. B. Div. 470; 2 Q. B. Div. 112; 2 App. Cas. 455. In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast for this port during the months of March and/or April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board, and bills of lading signed in February; and for the rest, consisting of 1,030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the house of lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning,—it is no observation which can dispose of, or get rid of, or displace, that literal meaning,—to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." Pages 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract." Pages 467, 468.

Lord Blackburn said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the house of lords, two cases were determined in the court of appeal. In Reuter v. Sala, 4 C. P. Div. 239, under a contract for the sale of "about 25 tons (more or less) black pepper, October and/or November shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within 60 days from date of bill of lading," the seller, within the 60 days, declared 25 tons by a particular vessel, of which only 20 tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In Honck v. Muller, 7 Q. B. Div. 92, under a contract for the sale of 2,000 tons of pig-iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the house of lords in Mersey Co. v. Naylor, 9 App. Cas. 434, affirming the judgment of the court of appeal in 9 Q. B. Div. 648, and following the decision of the court of common pleas in Freeth v. Burr, L. R. 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the house of lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first installment.

The Lord Chancellor said: "The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore, it is one contract for the purchase of that quantity of steel blooms. No doubt, there are subsidiary terms in the contract, as to the time of delivery,—'delivery 1,000 tons monthly, commencing January next,'—and as to the time of payment,—'payment net cash within three days after receipt of shipping documents,'—but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the court of appeal dicta were uttered tending to approve the decision in Simpson v. Crippin, and to disparage the decisions in Hoare v. Rennie and Honck v. Muller, above cited, yet in the house of lords Simpson v. Crippin was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in Honck v. Muller, distinguished Hoare v. Rennie and Honck v. Muller from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of Hoare v. Rennie and Coddington v. Paleologo, as well as in the later cases of Reuter v. Sala and Honck v. Muller, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of Simpson v. Crippin and Brandt v. Lawrence, and to accord better with the general principles affirmed by the house of lords in Bowes v. Shand, while it in no wise contravenes the decision of that tribunal in Mersey Co. v. Naylor.

In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are Hill v. Blake, 97 N. Y. 216, which accords with Bowes v. Shand and King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603, which approves and follows Hoare v. Rennie. The recent cases in the supreme court of Pennsylvania, cited at the bar, support no other conclusion. In Shinn v. Bodine, 60 Pa. 182, 100 Am. Dec. 560, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during the months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In Morgan v. McKee, 77 Pa. 228 and in Scott v. Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one installment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous installment of the goods. The decision of the supreme judicial court of Massachusetts in Winchester v. Newton, 2 Allen, 492, resembles that of the house of lords in Mersey Co. v. Naylor.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See Busk v. Spence, 4 Camp. 329; Graves v. Legg, 9 Exch. 709; Reuter v. Sala, above cited.

Judgment affirmed.

The chief justice was not present at the argument, and took no part in the decision of this case.

## CAHEN v. PLATT.

(Court of Appeals of New York, 1877. 69 N. Y. 348, 25 Am. Rep. 203.)

Earl, J. In September, 1872, at the city of New York, the plaintiff sold to the defendants ten thousand boxes of glass, at seven and one-half per cent discount from the tariff price of July, 1872, to be paid for in gold, at New York, upon delivery of invoice and bill of lading, by bills of exchange on Antwerp. The glass was to be of approved standard qualities, and was to be shipped on board of sailing vessels at Antwerp, and to be at the risk of the defendants as soon as shipped, and they were to insure and pay the freight and custom duties. The glass was to be delivered during the months of October, November and December, 1872, and January, 1873. In pursuance of this contract, the plaintiff delivered to the defendants four thousand nine hundred and twenty-four boxes of glass for which they paid. They refused to receive any more, and this action was brought to recover damages consequent upon such refusal.

The defendants claimed, and gave evidence tending to prove, that the glass delivered was not of approved standard quality, and hence that they had the right to refuse to take the balance.

While some months after the glass was delivered the defendants complained of its quality, they at no time offered to return it, or gave plaintiff notice to retake it. They received it under the contract, and it is not important in this action to determine, as no counter-claim is set up, whether or not a right of action for damages on account of the inferior quality of the glass survived the acceptance. The fact that the glass delivered and received upon the contract was inferior did not give them the right to repudiate the contract altogether. They could demand better glass, and when the plaintiff offered to deliver the balance, if it was inferior, they could refuse to accept it. But if plaintiff was ready and willing to deliver for the balance such glass as the contract called for, they were bound to receive it. Here the plaintiff requested them to take the balance of the glass, and they refused to take any more, and thus repudiated and put an end to the contract. There was no proof that the plaintiff insisted upon delivering inferior glass, or that he was not ready and willing to deliver glass of the proper quality. They did not take the position that they were willing to receive glass of approved standard quality, but refused to take any more glass under the contract. There was therefore such a breach of contract as entitled the plaintiff to recover such legal damages as he sustained by the breach.

The only other question to be considered is, whether a proper rule of damages was laid down by the court at the trial.

The contract was made in New York, and it was doubtless contemplated by the parties that the glass would be carried to New York. But the plaintiff was not bound to deliver it there. His delivery was upon shipboard at Antwerp, and after the glass was shipped the defendants could transport it to any part of the world. It was then at their risk, and they were liable to pay for it, although it should be lost. After plaintiff had shipped the glass, all he was bound further to do, to entitle him to payment, was to present to the defendants at New York the invoices and bills of lading of the glass.

Here the balance of the glass was not actually delivered. The defendants notified plaintiff not to ship, and absolutely refused to take any more, and hence the glass remained in Belgium. The general measure of damages in such a case is the difference between the contract-price and the market-price at the time and place of delivery. This measure is adopted as one that will generally give complete indemnity to the seller. He can dispose of the commodity contracted to be sold at the market-price, and his damage will be the difference between the price thus obtained and the price he would have received if the contract had been performed.

Evidence as to the price need not be confined to the precise time when the contract was to have been performed. It may sometimes be impracticable to show the price at the precise time, and hence evidence of the price for a brief period before and after the time may be given, not for the purpose of establishing a market-price at any other time, but for the purpose of showing as well as practicable the market-price on the day the contract was to have been performed. So it may not always be practicable to show the price at the precise place of delivery. There may have been no sales of the commodity there, and hence evidence of the price at places not distant, or in other controlling markets, may be given, not for the purpose of establishing a market-price at any other place, but for the purpose of showing the market-price at the place of delivery. Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Dustan v. McAndrew, 44 N. Y. 72; Durst v. Burton, 47 N. Y. 167, 7 Am. Rep. 428.

Here there was no difficulty. There was a market-price at the place of delivery. The defendants proved that the market-price there was thirty-seven and one-half per cent off from the tariff rate, and the plaintiff proved that the market-price in New York was fifty per cent off. The court charged the jury that the plaintiff was entitled to recover the difference between the contract-price and the market-price in the city of New York, and this charge gave the plaintiff several thousand dollars more than he could upon the evidence have recovered if the court had charged that the market-price at Antwerp should be taken instead of that at New York.

In this charge, which was properly excepted to, the court erred, and for this error the judgment must be reversed and new trial granted, costs to abide event. All concur.

Judgment reversed.[26]

## REYBOLD v. VOORHEES et al.

(Supreme Court of Pennsylvania, 1858. 30 Pa. 116.)

This was an action of covenant, by Peter Voorhees, Benjamin Marlatt, George Fielder, and Abijah Mount, trading as Voorhees, Marlatt & Co., against William Reybold. The case was tried on the 31st of December 1856, before Knox, J., and resulted in a verdict for the plaintiffs for $1,520.20; upon which judgment was entered.

It appeared on the trial that, on the 4th of August 1854, the parties entered into the following agreement:

"An article of agreement made, this fourth day of August, A. D. 1854, between William Reybold, of the county of New Castle, and state of Delaware, of the first part, and Peter Voorhees, Benjamin Marlatt & Co., of the state of New Jersey, of the second part, doth covenant and agree with the said William Reybold for all the peaches growing on his two farms in said county; and said Voorhees, Marlatt & Co., doth agree to find baskets to put said peaches in, and pay him seventy-five cents per basket for said peaches, picked, assorted, and delivered at Delaware city, in good merchantable order, at his own proper cost and expense, or as the said Peter Voorhees or his agent may require; said peaches to be paid for at the end of each week, as delivered at Delaware City."

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[26] See J. W. Ellison, Son & Co. v. Flat Top Grocery Co., 69 W. Va. 380, 71 S. E. 391 (1911), with elaborate note, 38 L. R. A. (N. S.) 539; and compare Enterprise Mfg. Co. v. Oppenheim, 114 Md. 368, 79 Atl. 1007, 38 L. R. A. (N S.) 548 (1911).

On the same day $500 was paid to the defendant, as security for the faithful performance of the agreement, and the following receipt was given by the defendant's agent:

"Aug. 4, 1854. Received from Voorhees, Marlatt & Co., five hundred dollars, on account of peach orchard, as per contract to be executed. Anthony Reybold, for William Reybold."

On the following morning, which was Saturday, the defendant delivered his peaches to the plaintiffs, but was requested to take them back again for that day, and not to begin to deliver them, under his contract, until the following Monday, which he did. And, on Monday, the 7th of August, he commenced to deliver his peaches on the wharf, at Delaware City, in accordance with his agreement, and delivered them to the end of the week; but, at the end of that time, neither the plaintiffs, nor any one on their behalf, appeared at Delaware City, to pay the defendant, who was there in waiting. Nor did any one of the plaintiffs, or any one for them, appear at Delaware City, to make payment on the following Monday, on which day the defendant shipped his peaches to them as usual.

On Tuesday, the defendant, not having been paid, or received any communication from the plaintiffs, and the peaches already delivered amounting to the sum of $539.25, stopped sending them his peaches, and shipped them to his agent in Philadelphia, to be sold on his own account. And, on the afternoon of the same day, the plaintiffs having ascertained that fact, went to Delaware City, and tried to induce the defendant to continue sending his peaches to them; which he refused to do, alleging that they had broken their contract, and had endeavored to overreach him. They did not, however, offer to pay for the peaches already delivered, and permit the original security to remain. They subsequently paid the balance of $39.25 due to the defendant. * * * [27]

LOWRIE, C. J. Promptness is of essential importance in the execution of a contract for the sale and delivery of a ripening crop of peaches; and when the parties have contracted for the times of delivery, and payment, they are entitled to be tried by their contract. If the buyer does not pay according to contract, the seller is not bound to keep the peaches for him at the risk of their rotting, nor to deliver them at the risk of not being paid, any more than the buyer would be bound to accept the delivery weekly instead of daily.

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[27] Part of the statement of facts is omitted.

Neither party has any time to be wasted by the unpunctuality of the other; and neither is required to endure the anxiety of having his summer's success dependent on one who is not careful of his engagement. The success of both depends upon their promptness in the performance of present duty. The seller could not expect the buyer to be running down to the country to look after his peaches, nor the buyer that the seller should be running up to Philadelphia after his money. It is the interest of both the peach dealer and the peach grower to agree upon the times of performance, and courts can do nothing better for the parties than to supervise the execution of the contract as made, without seeking to modify it, except where modification is required by circumstances beyond the control or contemplation of the parties.

The plaintiffs broke their contract by not paying up on Saturday, and the defendants had a right then to rescind it, and seek another market. He continued another day to execute it on his side, and again the plaintiffs failed. Then he rescinded, and a day or two afterwards the plaintiffs came and were willing to pay. We think they were too late. To relieve them would be to change their contract without cause, which we cannot do. If the plaintiffs came a few days afterwards, and offered proper terms to secure their future performance and these were rejected, this might be a defence against a suit for damages for their breach, but it could not restore the contract.

In deciding this, we have assumed that the $500 advanced were to stand as security for the plaintiffs' weekly payments, and not as a payment which they might apply to any week's delivery. We think that such is the contract. It says the payments shall be at the end of each week. The plaintiffs cannot get over this without presenting their receipt, and the necessary witness to prove it declares that the $500 were to stand as security. All the probabilities of the case, and all the other evidence confirm it. The plaintiff's case fails therefore at the very outset, because he cannot prove his own performance according to the contract. He did not pay at the end of the first week, nor offer to do it for several days afterwards.

After expressing these views, we are hardly called on to speak of the evidence furnishing a measure of damages. The place of delivery was Delaware City, and it is of the value in that neighborhood that we must inquire. Yet a great deal must be left to the discretion of the judge in defining the neighbourhood. In doing so he might very well know that, as a peach market, Delaware City is a mere outpost of Philadelphia, and might regard the neighbourhood as thus extended, and make allowance for difference of expenses. We incline to think, however, that New York could hardly be so regarded.

Judgment reversed, and a new trial awarded.

## SECTION 5.—INSPECTION

### McNEAL v. BRAUN.

(Court of Errors and Appeals of New Jersey, 1891. 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441.)

See ante, p. 320, for a report of the case.

### GIFFEN v. SELMA FRUIT CO. (Civ. 288.)

(District Court of Appeal of California, 1907. 5 Cal. App. 50, 89 Pac. 855.)

Cooper, P. J.[28] This action was brought to recover damages for breach of contract, and was tried before a jury. A verdict was returned for plaintiff, upon which judgment was duly entered. This appeal is from the judgment and order denying defendant's motion for a new trial.

The facts are in substance as follows: In September, 1904, the defendant entered into a contract in writing with L. F. Giffen & Co. (plaintiff's assignor) by the terms of which it agreed to seed and pack in a first-class manner the raisins of Giffen & Co. for the season of 1904–05 at the rate of $1.35 per 100 pounds.

In December, 1904, the defendant, under the contract, seeded and packed the car load of raisins, out of which this controversy arose for Giffen & Co., and received compensation therefor according to the terms of the contract. It is alleged that, instead of seeding and packing the raisins in accordance with the contract, the defendant negligently seeded and packed them so that they spoiled and became absolutely worthless. The verdict of the jury finds by implication that the allegation as to defendant's negligence is true. The statement on motion for a new trial shows that the plaintiff introduced evidence tending to show that the raisins were not in good condition, and that their condition "was due to the fault and negligence of the defendant in seeding, processing and packing said raisins." Appellant's counsel, in their opening brief, very frankly and properly admit that "the evidence as to such wrongful acts of defendant was conflicting, and the jury found for the plaintiff."

It seems, therefore, evident that the defendant violated its contract, and thus became liable for the damages it caused thereby.

It is contended, however, by the defendant that Giffen & Co., prior to the commencement of this action, had sold the raisins to McCord-Brady Co., of Omaha, and hence they argue that the right of action was in McCord-Brady Co., and not in the plaintiff. The decision of the case upon its merits is thus dependent upon the question as to whether or not Giffen & Co. had parted with the title to the raisins. The evidence shows that prior to the commencement of the action Giffen & Co. had agreed to sell to McCord-Brady Co. at Omaha a given quantity of raisins in accordance with a sample which had been sent. The car load of raisins involved in this suit was shipped to fill this order. The raisins were billed to the order of Giffen & Co. at Omaha subject to inspection. When the shipment was made, Giffen & Co. drew on McCord-Brady Co. for the agreed price of the raisins; the draft being attached to the bill of lading, and forwarded to the National Bank of Omaha for collection.

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[28] Part of the opinion is omitted.

The bill of lading bore across the face of it the direction to "Allow inspection." An invoice and bill of the raisins were sent to the McCord-Brady Co., and the draft was paid by them upon presentation, but at the time it was paid the company had not inspected nor received the raisins, because they had not arrived at their destination. Upon the arrival of the raisins, they were rejected upon inspection, and Giffen & Co. were notified of such rejection, and, upon being so notified, they stored the raisins in a warehouse in Omaha, and were unable to dispose of them. In the course of dealing between Giffen & Co. and the McCord-Brady Co., the drafts drawn on the company at Omaha were paid, charged to the account of Giffen & Co., and the goods, when received, credited to Giffen & Co. The draft in this case was charged to the account of Giffen & Co., and has since been paid in full by them.

We are of opinion that the above facts do not constitute a sale of the raisins to the McCord-Brady Co. A sale is a contract by which one transfers to another an interest in property. In order to constitute a sale, the contract must give and pass rights of property. The property must be identified. The evidence shows that the raisins were bought by sample, and that they were rejected because not up to sample. Upon proof that the sale was made by sample the law implies a warranty that the quality of the property sold is up to the sample exhibited (Civ. Code, § 1766), and the title will not pass until there has been an acceptance. Mechem on Sales, §§ 522, 746, 1212; Pope v. Allis, 115 U. S. 372, 6 Sup. Ct. 69, 29 L. Ed. 393; Taylor v. Saxe, 134 N. Y. 67, 31 N. E. 258; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964.

It is claimed that the delivery of the bill of lading with the draft to McCord-Brady Co. had the effect to transfer the title of the car load of raisins to McCord-Brady Co. A bill of lading does not in all cases transfer the title of the property described thereon to the party to whom it is delivered. It depends upon the circumstances of the particular case and the intention of the parties. In this case the intention was that the bill of lading should be delivered to Mc-

Cord-Brady Co. with the draft, and when the draft was paid and the raisins inspected, and accepted as being up to the sample, the title should vest in McCord-Brady Co. The bill of lading was delivered, the draft paid, but the goods were not what McCord-Brady Co. had purchased, and they never accepted them, nor did they take possession of them. It was not intended that the title should pass by the delivery of the bill of lading. A bill of lading does not have the effect of passing the title, where the evidence clearly shows a contrary intention. Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 364, 18 Am. Rep. 299; Hilmer v. Hills, 138 Cal. 135, 70 Pac. 1080; Dodge v. Meyer, 61 Cal. 405. * * *

The judgment and order are affirmed.

## EATON v. BLACKBURN.

(Supreme Court of Oregon, 1908. 52 Or. 300, 96 Pac. 870, 20 L. R. A. [N. S.] 53, 132 Am. St. Rep. 705, 16 Ann. Cas. 1198.)

This is an action to recover the purchase price of two car loads of hay. The defense is that the hay, which plaintiff agreed to sell and deliver to defendants, was to be "good, number one, merchantable hay," and that furnished was not of this quality, for which reason it was rejected. The defendants are commission merchants, residing and doing business in Baker City. Plaintiff resides in Union county, some miles distant from Baker. In March, 1906, he contracted and agreed to sell to defendants five car loads of hay, for use in their business, at $11.50 per ton, f. o. b. cars, Nodine Spur, Union county. The contract was made at Baker City, and defendants were to pay the freight from place of shipment to that point. but nothing was said about the time or place of payment, or the inspection or acceptance of the hay. Shortly after making the contract, plaintiff loaded two cars with hay at Nodine Spur, and the same were carried by the railroad company to Baker, reaching there Sunday morning, March 25th. On the following day defendants, before they had examined or inspected the hay, made some effort to sell it, but were unable to do so. On the morning of the 27th, in company with Abercrombie—a prospective purchaser—Mr. Breck, one of defendants, opened the cars, in which the hay had been shipped, and examined it, but Abercrombie was unwilling to purchase. In the afternoon of the same day they made a further and more careful examination, and Breck, claiming that the hay was not of the kind and quality contracted for, refused to accept it, and so notified plaintiff and the railroad company on the following morning. At the time Breck and Abercrombie were examining the hay on the afternoon of the 27th, two bales were taken out of one of the cars for inspection, and on the same afternoon one of defendants' employés, without their knowledge or authority, sold one of such bales to a shipper of stock passing through Baker City, and paid the money over to defendants. As soon as they learned of the sale, they repudiated the act of their employé, and directed him to return to the car another bale equally as good, or better, than the one sold by him. At the time of the trial it was contended by plaintiff that, under the contract between him and defendants, it was the duty of defendants to inspect and accept or reject the hay at Nodine Spur, where it was to be loaded on the cars; and, if they neglected to do so, they were bound to receive such hay as was actually shipped, and rely upon a claim of damages for breach of contract, if it was of inferior kind and quality, but, if this was not so, defendants' conduct, after the hay reached Baker City, was such as to amount, in law, to an acceptance thereof.

The court instructed the jury that if the hay, delivered on the cars by plaintiff at Nodine Spur, was substantially the kind and quality called for by the contract, it would amount to a full and complete performance, and enable him to recover the contract price, whether the hay was subsequently accepted by defendants or not; and, if the hay was different or inferior to that which plaintiff agreed to sell, notwithstanding which the defendants accepted it, or did something amounting to an acceptance, they could not thereafter repudiate their liability by returning or tendering a return of the hay, but that defendants had a reasonable time in which to inspect the hay after it reached Baker City, and if it was, in fact, of an inferior quality, and not according to the contract, they could reject it, and refuse to accept or pay for it, and if they did so, plaintiff could not recover in this action. The court also held that the question as to whether defendants accepted the hay after it reached Baker was one of fact, to be determined by the jury under proper instructions from the court, which were given accordingly.

The cause was tried before a jury, and a verdict rendered in favor of defendants. From the judgment subsequently rendered thereon, this appeal is taken. The errors assigned are in the giving and refusing of certain instructions and admission of testimony. Affirmed.

Bean, C. J.[29] (after stating the facts as above). The principal point relied upon by plaintiff for a reversal of the judgment is the ruling of the court that, under the contract for the sale of hay in question, defendants had a right to inspect it after it reached Baker City, and, if it did not conform to the contract, to refuse to accept or pay for it. The argument is that the place of inspection and acceptance or rejection was at Nodine Spur, where the hay was to be delivered by the plaintiff, f. o. b. cars; and, if defendants neglected to exercise the right of inspection at that time and place, they were liable for the value of the hay so delivered. But we do not so find the law. No place or time of payment or of inspection or acceptance was stipulated in the contract. All parties concur in this point. The contract was made between plaintiff and defendant Breck. These gentlemen both say that Breck met plaintiff at the depot at Baker City, and inquired of him if he had any hay for sale, and that he (plaintiff) said he had; that the price was $11.50 per ton, f. o. b. cars at Nodine Spur, and that Breck said he would take five car loads at that price, and under the conditions named.

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[29] Part of the opinion is omitted.

The only difference between the witnesses is in reference to the terms of the contract regarding the kind and quality of hay to be delivered, and that matter is concluded by the verdict of the jury. Some stress is laid, by counsel for plaintiff, upon a statement by Mr. Breck, on cross-examination, that he would have had the privilege of examining the hay if he had gone down to Nodine Spur, but this was merely the opinion of the witness, and was not part of the contract. Indeed, when asked as to whether he was to be present at Nodine Spur to receive the hay for shipment, he replied: "Mr. Eaton knew it was impossible for me to be there. There was no understanding of that kind at all."

So that it is manifest from the testimony that there was no time or place of inspection or acceptance agreed upon by the parties, or for the payment of the purchase price. The payment, therefore, became due and payable on a complete delivery, and there could be no such delivery without an opportunity for inspection. Under an executory contract for the future sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them; and, unless he does so, he is not liable therefor. This necessarily gives to the vendee the right, and imposes upon him the duty, of inspection, and he must therefore be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides; and where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them, if they do not comply with the contract. Brigham v. Hibbard, 28 Or. 386, 43 Pac. 383; Johnson v. Hibbard, 29 Or. 186, 44 Pac. 287, 54 Am. St. Rep. 787; Steiger v. Fronhofer, 43 Or. 178, 72 Pac. 693; Puritan Mfg. Co. v. Westermire, 47 Or. 557, 84 Pac. 797.

Pierson et al. v. Crooks et al., 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831, is much in point. That case construed a contract between a New York importer and a London dealer, for the sale of iron by the latter to the former. The iron was to be delivered f. o. b. at Liverpool, and paid for by bills of exchange at 60 days, on delivery of the shipping documents at New York. The iron shipped by the London dealer was not in compliance with the contract, and the New York merchant refused to accept it, and brought an action against the vendor to recover money paid for duties and expenses at the port of New York. The seller contended that the buyer was bound to inspect the iron and ascertain its quality at Liverpool; and, not having done so, it was in law an acceptance, which precluded him from subsequently questioning the quality or returning the goods. But the court refused to concur in this view, and Mr. Justice Andrews says: "When and at what place the right of inspection was to be exercised was not definitely fixed by the contract. The intention of the parties, when ascertained, is to govern. They might have provided that the inspection should be made either at Liverpool or at New York. The contract is silent on this point; and the defendants insist that, in the absence of express words, the law ascertains and fixes the intention that examination should be made at the place where the defendants were to deliver the iron, to wit, at Liverpool. We are, however, of the opinion that where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier, to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination, and that the carrier is not the agent of the vendee to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them."

In answer to the argument made there, as here, that the title vested in the vendee upon the delivery of the goods to the common carrier, and that the vesting of such title implies an acceptance, and is inconsistent with the alleged right of inspection and rejection of the goods on their arrival at the place of destination, the learned justice says: "But assuming that the title to the iron, for some purpose, vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title, subject to the right of inspection and rejection of the inferior quality on arrival at New York. * * * The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule—more injurious even to the dealer or manufacturer than to the purchasers—if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered."

The same doctrine was applied by the Supreme Court of Massachusetts in Alden v. Hart, 161 Mass. 576, 37 N. E. 742. In that case the defendants, residing at New Bedford, ordered a quality of coal to be shipped from Weehawken, N. J., by certain line of barges, defendants to pay the freight. The coal shipped was not of the kind and quality ordered, and the court held that the defendants had the right to reject it on its arrival at New Bedford, Mr. Chief Justice Field remarking: "Whether in such case as this, the title to the property passes to the vendee when the coal is delivered on board the barge is not free from doubt, and we have not found it necessary to decide the question. If it be assumed, in favor of the plaintiffs, that the title to this coal passed to the defendants when it was selected by the plaintiffs, and laden free on board upon the barge at Weehawken, and when bills of lading were given to the plaintiffs, under which the cargo was to be delivered to the defendants or their assigns at the port of New Bedford, they paying the freight, we are yet of the opinion that the rulings at the trial were correct. If the title passed to the defendants, it was a conditional title, and the condition was that the coal should be found to be of the quality purchased, and the defendants could reject the coal if, upon examination, it did not conform to the implied warranty that it should be merchantable." To the same purport, see Morse et al. v. Moore, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; Holt v. Pie, 120 Pa. 425, 14 Atl. 389; Fogle v. Brubaker, 122 Pa. 7, 15 Atl. 692.

We are of the opinion, therefore, that no error was committed by the court below in its ruling on this phase of the case. In Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, cited by plaintiff, the contract required payment to be made for the goods at the place of shipment, which the court held was necessarily inconsistent with a right of inspection at another place. But here, as we have seen, no time or place of payment was specified, and therefore it did not become due until the goods were delivered. The cases of Barr v. Borthwick, 19 Or. 578, 25 Pac. 360, and Meyer v. Thompson, 16 Or. 194, 18 Pac. 16, have no particular bearing here. The question in the former case was one of title, and in the latter whether there had been a sufficient delivery to take a parol contract, for the sale of personal property, out of the statute of fraud.

It is also insisted that defendants waived the right to reject the hay for defective quality, by their action and conduct in relation thereto after it reached Baker City. But this question was for the jury, and, we think, was fairly submitted to them. The defendants were not precluded from rejecting the hay by merely receiving it. They still had a reasonable time in which to inspect and reject it, if not according to the contract.

Nor did their offer to sell and dispose of the hay, before they had examined it, amount to an acceptance. This was before they ascertained that it was of an inferior quality, and was on the assumption that plaintiff had complied with his contract, and shipped hay of the kind and quality agreed upon. It was therefore not conclusive in law of an intent to accept the hay, in performance of the contract (Benjamin on Sales, § 703).

Nor, again, was the unauthorized sale of one bale by an employé of defendants conclusive of the acceptance by them of the entire shipment. The evidence shows or tends to show, that the employé had no authority, either express or implied, to make such sale, and that it was promptly repudiated by the defendants as soon as they learned of it. The question of the acceptance of goods is ordinarily for the jury (Benjamin on Sales, § 895), and there is nothing in this record to take this case out of the operation of the rule. * * *

Finding no error in the record, the judgment is affirmed.[30]

## SAMUEL M. LAWDER & SONS CO. v. ALBERT MACKIE GROCERY CO.

(Court of Appeals of Maryland, 1903. 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795.)

Lawder & Sons Company of Baltimore, contracted to sell to the Mackie Grocery Company, of New Orleans, 700 cases of tomatoes at 52½ cents per dozen. "Terms cash, less 1½ per cent. Buyer to give shipping instructions when requested by seller. To be delivered as packed during the season of 1901, f. o. b. Baltimore." When the goods were loaded on a car ready to go forward the seller notified the buyer and requested payment, to which request the buyer replied: "Will not pay for the tomatoes until the goods reach us." Thereupon the seller refused to send forward the goods and the buyer brought this action for breach of contract. Judgment below was for the plaintiff.[31]

Boyd, J. * * * Great stress was placed on the right of the appellee to inspect the goods before acceptance. If it be conceded that it had such right, as it may be, the further question arises as to where, under this contract, it could be exercised. The mere fact that the buyer has the right to inspect goods before acceptance does not necessarily mean that the inspection is to be made at the residence or place of business of the buyer. He might inspect at the seller's place of business, but, if the contract provides for delivery at a particular place, he must accept or reject at that place, unless otherwise provided for in the contract. In short, a contract to deliver at one place cannot be said to mean delivery at another place, because the buyer lives there, and has the right to inspect the goods, and there is no such uncertainty as to the place of delivery in this contract as would justify the court in holding that it was at New Orleans, because the appellee had its place of business there. An inspection of canned goods at any place away from the canning establishment must be attended with some difficulties. Every can that is opened is doubtless injured for the ordinary purposes of trade; for unless it is speedily sold the fruit or vegetables must soon become worthless. There is nothing in the record to show what the custom is as to inspection, and the parties made no special provision in the contract for it, but it is manifest that there could not be an inspection of every can in 700 cases at the place to which they were to be shipped. But whatever inspection was to be made could have been done as well at the place from which the goods were shipped as at the point of destination, and it is mainly a question of convenience to the respective parties as to where it shall be made. If they determine that by their contract it must control, and if it is silent as to inspection, but is as clear as this is as to delivery, any inspection that is desired before payment must be made before or at the time of delivery, when the terms are cash. * * *

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[30] A petition for a rehearing was conditionally denied. See 52 Or. 310, 97 Pac. 539, 20 L. R. A. (N. S.) 53, 132 Am. St. Rep. 705, 16 Ann. Cas. 1198.

[31] The statement of facts is abridged, and part of the opinion is omitted.

Judgment reversed, and a new trial awarded, the costs to be paid by the appellee.

## LOUISVILLE LITHOGRAPHIC CO. v. SCHEDLER.

(Court of Appeals of Kentucky, 1901. 63 S. W. 8, 23 Ky. Law Rep. 465.)

GUFFY, J.[32] It is alleged in the petition that the defendant (now appellant) was indebted to the plaintiff in the sum of $72.75 for goods, etc., sold and delivered to the defendant by plaintiff, as shown by an account filed, which is as follows:

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| Dec. 27, '97. | Des. Pickaniny cigar label.......................... | $14 00 |
| Jan. 25, '98. | Stonework. Pickaniny label and proving six colors..... | 58 00 |
| | Boxing stones........................................ | 75 |
| | | $72 75 |

The answer of the defendant is a denial, in effect, of the purchase of the articles claimed, or of the promise to pay for the same. In the second paragraph it is alleged that the plaintiff undertook to make, design, and prepare a stone for the defendant, whereon it could manufacture, make, and print lithograph labels for a cigar known as the "Little Alabama Coon's Cigar," and that it was agreed that the same should be made in accordance with the design theretofore prepared, and that plaintiff did make a special stone, and sent the same to the defendant "C. O. D." (collect on delivery), so wrapped up and concealed that it could not examine the same; that defendant endeavored to obtain from plaintiff permission to examine the same,[33] with the announcement on its part that it would pay the full value thereof, and take the same from the express office, if it came up to the agreement, and was in accordance with the design, but that the plaintiff refused to allow the same to be examined or inspected, and refused to allow the defendant to see the same at all, hence defendant refused to take it; that defendant furnished the stone to plaintiff to make the design, and that the same was worth $3.35. It was further alleged that, by reason of the failure and refusal of the plaintiff to make and deliver said stone according to agreement, defendant was greatly damaged and delayed, and that defendant was damaged in the sum of $250, for which it prayed judgment. It was also alleged in an amendment that the package sent by express as aforesaid was not of the kind nor was the workmanship what was ordered by the defendant, and the same was not sent in accordance with the agreement, or in accordance with what was contemplated by the agreement, between the parties; that it was not agreed or contemplated that the package should be sent sealed or concealed or marked "C. O. D.," and that according to the agreement between the parties, and the custom between them, packages had been sent, and this one was to be sent, with the understanding that it was to have an opportunity of examining same before payment. After the issues were made up, and proof taken, the court instructed the jury peremptorily to find for plaintiff the amount claimed, and to dismiss the defendant's counterclaim, and, the appellant's motion for a new trial having been overruled, it prosecutes this appeal.

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[32] Part of the opinion is omitted.

[33] As to the duty of an express company to allow inspection of goods sent C. O. D., see Wiltse v. Barnes, 46 Iowa, 210 (1877). As to the duty of a carrier to allow inspection, in general, see Williston, Sales, § 478.

The grounds relied upon for a new trial are—First, that the verdict was contrary to law; second, that it was contrary to the evidence; third, because the court erred in giving the peremptory instruction at the conclusion of the defendant's testimony.

It appears from the testimony in this case, and from the letters passing between the parties filed, that the appellant is a lithographic company in Louisville, the business of which is to obtain what is called "lithographic stones," so prepared that it may print or make a certain design, and that it had a contract with a certain company to furnish to it a large number of cigar labels of the kind mentioned in the pleadings, which had to be of a proper stamp, color, etc., and for which appellant had prepared a sketch. It appears that appellant had condemned several proofs furnished to it by appellee, who resided in New York or New Jersey, but finally a proof was sent that was, in substance, "O. K.'d" by appellant, but in the "O. K." letter it was stated in effect that appellee should remember that the same should be "A No. 1," as mentioned in former letters. It further appears that some correspondence had taken place between the parties in which plaintiff had demanded that a payment should be forwarded to him for the work, which defendant declined to do, and pretty soon thereafter plaintiff expressed the stone. From the letter it appears that plaintiff was directed to forward the stone by express, but there was nothing in the letter indicating that it was to be forwarded "C. O. D.," although about the time of the writing of the letter in question by the appellant the plaintiff had written that he would ship it "C. O. D."

The contention of appellee is that he was entitled to ship the stone in question "C. O. D.," and that it was the duty of the appellant to pay the charges and accept the same. He also contends that appellant never asked him to be allowed to examine the package sent, while appellant's contention is the reverse. It is contended for appellee that the universal custom and law is that the purchaser must pay for the goods on delivery, unless by agreement time is to be given. This contention may be true, but it does not follow that a party in New York may, when a party in Louisville has purchased a particular article, send the same so concealed that it cannot be examined, marked "C. O. D."; thus requiring the purchaser to pay for an article which he has not had any opportunity to examine, and determine whether it is the article purchased by him or not. Under all of the facts and circumstances proven in this case, we do not think that appellant was necessarily bound to accept the express package and pay for the same and the question as to whether he should have done so or not should have been submitted to the jury. * * *

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## CREAM CITY GLASS CO. v. FRIEDLANDER.

(Supreme Court of Wisconsin, 1893. 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895.)

Action for money had and received. Plaintiff company manufactures glass at Milwaukee. They entered into the following contract with defendant September 4, 1890:

"Chicago, September 4th, 1890.

"Cream City Glass Company: Sold to you about one hundred and fifty (150) tons Muspratt Bros. & Huntley's 48 per cent. carbonated soda ash for shipment by steamers from Liverpool, monthly, in about equal parts, during the months of October, November, and December, of the current year, (about fifty tons monthly,) at $1.65 per 100 net, invoice weights, cash on arrival, against delivery of documents, less one per cent., accidents to factory, in transit, or force majeure excepted. Subject also to changes, if any, in United States tariff laws during pendency of this contract. L. M. Friedlander.

"No change in tariff impending. L. M. F."

Muspratt Bros. & Huntley were manufacturers of soda ash at Liverpool, England. In accordance with the contract, Friedlander caused to be shipped from Liverpool 63 tierces, or 113,390 pounds, of soda ash, which arrived on plaintiff's side track at its factory about December 13, 1890. Plaintiff paid duties and freight on the shipment, also the contract price of the goods, amounting in all to $1,698.17. The goods were unloaded by plaintiff. Upon examination the material appeared to have been damaged by water, and plaintiff caused the following letter to be sent to defendant, December 13, 1890:

"Dear Sir: The railroad has just delivered your soda to us. On opening it, we find it absolutely unfit for use. The casks have evidently been under water until over half of the soda has soaked away. We wish you would come up and see it at once.

"Very truly yours, Cream City Glass Co."

On December 19, 1890, plaintiff gave to defendant personally the following notice:

"Dear Sir: Please take notice that the shipment of soda ash made by you and received by us on or about the 10th day of December, 1890, under your contract of September 4th, 1890, amounting to about sixty-three casks, was found to be wholly unfit for the uses and purposes for which it was purchased. We therefore notify you that we hereby rescind the said sale, and hereby offer to return to you the said soda ash. We further notify you that said soda ash is now at our factory, subject to your order, and that we hereby demand immediate repayment to us of the purchase price paid by us therefor.

"Respectfully yours, Cream City Glass Co.
"Richard Ogden, Sc."

Evidence was introduced tending to show that the soda ash was not suitable for the manufacture of glass, and contained but 34 per cent. of alkali, instead of 48 per cent. The evidence showed, however, that the ash was of some commercial value, though not as much as it would have been worth had it contained 48 per cent. of alkali.

Friedlander refused to receive the property back, and in the latter part of January or first part of February, 1891, the plaintiff made a practical test of the material, by using about 6 tierces thereof, amounting to 1,500 or 1,600 pounds, in one of its furnaces, mixing it with the other necessary materials, and endeavoring to make glass. Plaintiff claims that the test showed that glass could not be made from the ash. There was evidence tending to show that it was necessary to use this amount to make a practical test of the material.

Upon the question of the effect of this test upon the plaintiff's right of rescission the trial judge charged the jury as follows: "If you find from the evidence that the plaintiff, in making such test, used more of the soda ash in question than was absolutely necessary to determine its merchantable quality, or whether it was fit and proper for the uses for which it was bought and sold, or whether it was in accordance with the contract, or if you find that it was unnecessary to make such test, then such act is inconsistent with such rescission, and you will find for the defendant; or, if you find from all the facts and circumstances in the case that the plaintiff, after such election to rescind, did any act inconsistent with the ownership of the defendant, then you will find for the defendant." To which charge defendant excepted.

There was a verdict and judgment for plaintiff for the full amount of the purchase money, freight, and duty paid, from which defendant appeals.

WINSLOW, J.[34] (after stating the facts). * * * We shall consider but one other question upon this appeal, and that is the question of the effect upon the rights of the parties of the use of six tierces of the soda ash by the plaintiff in January or February following the sale, for the purpose of testing its fitness for the manufacture of glass. Assuming that the evidence is sufficient to establish an implied warranty that the soda ash in question was of a quality reasonably fit to be used in the manufacture of glass, the question is, could the plaintiff, after having decided that the material was wholly unfit, and notified the defendant of its decision and its rejection of the material, proceed to use three quarters of a ton of the material in making a practical test, and still insist on its right of rejection? It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. Benj. Sales (6th Ed.) § 703. If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. Benj. Sales (6th Ed.) § 896; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881.[35] But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable.

Now, in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. Churchill v. Price, 44 Wis. 540. They must do no act which they would have no right to do unless they were owners of the goods. Benj. Sales (6th Ed.) § 703. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness for the purposes of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected, and was owned by defendant. It follows that the judgment must be reversed.

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[34] Part of the opinion is omitted.

[35] In this case the court said: "It is claimed the court should have allowed the plaintiff to recover for the value of the forty-two barrels used or sold by defendant in testing the article before he found out its inferiority. Had this been done, simple justice would have required the allowance to the defendant of the damages it sustained in the use it made of the plaintiff's goods in testing the quality, and this, according to the undisputed testimony, was at least $1000, so that it clearly appears the plaintiff has not been injured by the action of the court upon this point complained of. Certainly the defendant derived no benefit from the amount used. The article appears to have been, however, one which must be used before its quality can be ascertained. It was not apparent upon examination, and in such case it is the right of the defendant to make use of so much thereof as, under all the circumstances, may become actually necessary for that purpose, without liability for the value of the same if it fails in the test to fulfill the plaintiff's contract."

Judgment reversed, and cause remanded for a new trial.

## LINCOLN v. GALLAGHER.

(Supreme Judicial Court of Maine, 1887. 79 Me. 189, 8 Atl. 883.)

This was an action of assumpsit for damages on a breach of contract for the purchase and sale of thirty-five sixty-fourths of the schooner Annie Gus, of Dennysville, Maine.

The defense was that the schooner was not delivered by plaintiff to defendant in a reasonable time, and that the defendant had no opportunity to examine the vessel in order to see that she was in good order, as stipulated in the contract.

Writ was dated March 20, 1885.

The case was tried at the January term, A. D., 1886, in and for the county of Washington, and a verdict rendered for the plaintiff.

PETERS, C. J. It was said in Howard v. Miner, 20 Me. 330, that, on contract for the delivery of specific articles which are ponderous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one; that the debtor should request the creditor to select the place; and, if the creditor fails to do so, the debtor may appoint the place.

In the case at bar a vessel was purchased on the eastern coast somewhere, to be delivered to the buyer in Portland. Had the defendant provided a suitable place at some dock or wharf which could have been reached by the use of reasonable exertion, the delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor. He should not be required to go to special expense to himself to obtain a place at the wharf or upon the shore.

By the bill of exceptions examined with the judge's charge we find that a controversy arose between the parties over the requirement of the purchaser that the seller should go to the expense himself of placing the vessel in a dry-dock in order that the seller could there examine her. There was some reason to expect that the vessel had been ashore on her voyage to Portland, and the purchaser desired an inspection to see whether she had escaped injury or not.

There can be no doubt that, in offering delivery, the seller was under obligation to afford an opportunity to the purchaser to make the examination. But any expenses to be incurred thereby, beyond what would be necessary in putting the vessel in a proper place for delivery, would fall upon the buyer and not upon him. The seller was under no obligation to incur any unusual expense. He could not be called upon to place the vessel in a dry-dock. He tenders the property as sound according to the agreement under which he acted. The buyer must accept or reject it at his risk. Benj. Sales, § 695; Croninger v. Crocker, 62 N. Y. 151.

Exceptions overruled.

WALTON, DANFORTH, EMERY, FOSTER, and HASKELL, JJ., concurred.

## SECTION 6.—ACCEPTANCE

### GAYLORD MFG. CO. v. ALLEN.

(Court of Appeals of New York, 1873. 53 N. Y. 515.)

This action was brought by plaintiff, as assignee of the Chicopee Malleable Iron Works, to recover a balance claimed to be due upon sale to Richard L. Allen, defendant's intestate, of a quantity of malleable iron castings. The answer set up as a counter-claim a breach of contract as to time of delivery, and a warranty of quality and breach thereof. The reply denied the warranty, alleged acceptance, and that all delays were occasioned by the neglect of defendant to furnish patterns as agreed. The facts sufficiently appear in the opinion.

ALLEN, J.[36] Whether the contract was made before, or on or after the 7th of January, 1865, is not material; or whether it rested partly in parol and partly in writing, or otherwise. It would seem from the evidence that the principal negotiation was verbal, at a personal interview between the agents of the contracting parties at the works of the plaintiff at Chicopee and at Northampton, the parties visiting the latter place to inspect one of the machines for which castings were wanted, at which interview the referee was authorized to infer from the evidence that the character, description and quality of the castings, and the purposes for which they would be wanted, were understood by the parties; and that they parted, leaving nothing but the terms or prices at which the plaintiff would contract to furnish them undetermined.

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[36] Part of the opinion is omitted.

The evidence is that, at parting, the representative of the Chicopee Malleable Iron Works, the contracting party, and to whose obligations and rights the plaintiff has succeeded, was requested by the representative of defendant's intestate to inform him by letter the terms on which the company would take the contract or do the work. The letter was written on the 7th of January, stating the price per pound at which the castings would be made, and promising, if an order should be given, to put the patterns in the works as soon as they were received, and stating that the writer had no doubt that the first delivery would be made as required, and that monthly deliveries would be continued, and promising to make every exertion to complete the order as desired, concluding with a statement that, in all probability, the company would be able to meet every requirement, and expressing a hope to receive the order, and promising prompt attention. The reply to this was an order, under date of 10th of January, for a large number of castings of different descriptions and weights, with a specification of the date and times at which they would be wanted, and promising to send most of the patterns the next morning and the balance in a few days, except those for a pony machine, which would not be ready until spring, the order concluding with the expression of a hope that the company would be able to furnish the castings ordered in quantities according to the date specified, and of suitable quality. But following the signature to the order, the following note is added: "The above to be at sixteen cents (16c.) per lb., as agreeable to your letter of January 7, 1864, and to be of the best quality and suitable to the purpose designed." No answer was made to this order, in writing or verbally, so far as appears; but the contracting company—hereafter called the plaintiff, as the plaintiff has taken its place, under the contract—proceeded on receipt of the patterns to manufacture and furnish the castings.

Whether the agreement was consummated by the letter of the 7th of January, fixing the price as found by the referee, or by that of the 10th of January, acceding to the terms and ordering the castings, is not material. There is no dispute that the contract was made substantially as found by the referee. Whether the addendum to the letter of the defendant's intestate is or is not a part of the contract, the legal effect is the same. The referee has not found that there was any warranty, express or implied, of the quality of the castings, or that they should be suitable to the purpose for which they were designed, and so far as appears, was not requested to find such fact. There is no ground for complaint that the castings were not of the best of iron, and of the best quality as castings, after they were finished. The only objection to them was, that they were not well or sufficiently annealed, and were not for that reason suitable for the purpose for which they were required, or could not as readily or profitably be wrought and applied to such purposes as if they had been more perfectly or thoroughly annealed. The law would imply precisely that which the defendant's claim made a part of the express contract.

This was an executory contract for the manufacture and sale of goods, and is distinguished from a sale of goods in existence, defined and specifically sold. A contract to manufacture and deliver an article at a future day carries with it an obligation that the article shall be merchantable, or if sold for a particular purpose, that it shall be suitable and proper for such purpose. Hargous v. Stone, 5 N. Y. 73, and cases cited by Judge Paige, at page 86; Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; Dutchess Co. v. Harding, 49 N. Y. 321. Incorporating into the agreement the obligation which the law implies would superadd nothing to the contract, or vary its nature, or affect the remedy upon it. Sprague v. Blake, 20 Wend. 64. Whatever agreement there was, whether expressed or implied, was a part of the contract, and was not a special warranty or agreement collateral to it, and in the absence of fraud or artifice in inducing an acceptance of the article, did not survive the execution and performance of the contract.

It is not intended to express an opinion as to the rule in case there were latent defects, or those which could not be discerned at the time of the delivery or acceptance of the articles. But in the absence of fraud or latent defects, an acceptance of the article sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article. The party cannot, under such circumstances, retain the property, and afterward sue or counter-claim for damages, under pretense that it was not of the character and quality or description called for by the agreement. Dutchess Co. v. Harding, and Reed v. Randall, supra, and cases cited; McCormick v. Sarson, 45 N. Y. 265, 6 Am. Rep. 80. The dissents in the latter case were not to the principle decided, but to its application under the facts and circumstances of that case.

Although the referee has not found, in terms, that the quality of the castings was patent and easily to be discerned upon inspection and attempt to use them, and that the defendant had full opportunity to and did examine them and know their quality, the evidence clearly shows this to have been so, and the fact is clearly to be implied from the findings of the referee. It was the duty of the intestate therefore to return the defective castings at once, and having omitted to do so, he must be deemed in law to have waived all objections to them. And the result is the same, whether the agreement as to the quality of the articles is implied or express. But the report of the referee is that the intestate did object to some of the castings, and they were reannealed by the plaintiff, and returned to and accepted by the intestate; and that the residue of the castings were accepted and used without objection or complaint. This was a waiver of all objection to the quality of the articles, and an assent to accept them in performance of the contract.

The report might have gone much further. The evidence would have warranted the referee in finding that the intestate voluntarily, after a delivery of some of the castings, and without claiming that they were not of the quality called for by the contract, employed the plaintiff to reanneal them, and agreed upon the price to be paid, and had others reannealed elsewhere, without making claim upon the plaintiff. The whole case shows that the castings were regarded at the time of the delivery and acceptance, and when their quality and condition was well known, as well by the intestate as by the plaintiff, as answering the description and call of the contract; and that the claim that they did not do so was an afterthought, when the plaintiff had declined to accept the note of the intestate instead of the money for the balance due. There was no agreement to furnish the castings at any particular time, and the referee has so found.

* * *

The judgment must be affirmed. All concur; GROVER and FOLGER, JJ., concurring in result.

Judgment affirmed.[37]

## DAY et al. v. POOL et al.

(Court of Appeals of New York, 1873. 52 N. Y. 416, 11 Am. Rep. 719.)

PECKHAM, J.[38] Action for damages for alleged breach of warranty upon a contract to sell and deliver to the plaintiffs at a future day, eighty barrels of rock-candy syrup. The contract of sale with warranty was proved, or sufficiently so for the jury, and the breach; but it also appeared in proof that the plaintiffs, after receiving the syrup and discovering its failure to comply with the warranty, proceeded to use it in their business of wine manufacture, and neither returned nor offered to return it. Upon this ground the plaintiffs, on defendants' motion, were nonsuited at the circuit. It appeared that the plaintiffs required and desired to purchase for their business, in a western county, an article of rock-candy syrup "that would not crystallize, or the sugar fall down" in its use.

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[37] As to the case of latent defects, see Zabriskie v. Central Vermont R. R. Co., 131 N. Y. 72, 29 N. E. 1006 (1892).

[38] The statement of facts is omitted.

This the defendants, merchants in the city of New York, undertook to sell to them, and to warrant in these respects. The syrup was manufactured in Boston; but samples of the syrup were shown at the time of the contract to the plaintiffs. It was to be ordered by defendants from Boston. It was all to be sent to plaintiffs by the 15th of October then next, in two car-loads. It was in fact delivered in small parcels, at different times, up to the last of November.

The plaintiffs complained of the deficiency of the syrup at various times to the defendants while they were delivering it; at one time sent a sample of that already received, complaining of its deficiency; and the defendants promised to correct it (though they insisted it was then sound). If not, they could "do it at the end." The plaintiffs paid for the syrup in full before suit.

The question presented is, did the plaintiffs' claim for damages survive their acceptance and use of the syrup, or were they bound to return or offer to return the defective syrup as soon as its deficiency was discovered? In other words, were they bound to rescind the contract, or could they use the syrup and rely upon their warranty?

There seems very little authority upon this precise point in this State, viz., as to an executory sale, with warranty as to the quality of the article contracted for.

It is well settled that upon a sale and delivery in presenti of goods with express warranty, if the goods upon trial or full examination turn out to be defective, and there is a breach of the warranty, the vendee may retain and use the property, and may have his remedy upon the warranty without returning or offering to return. In fact it seems to be regarded as settled in this State, though perhaps not necessarily determined in any case, that he has no right to return the goods in such case, unless there was fraud in the sale. It is not necessary to decide that point in this case. Voorhees v. Earl, 2 Hill, 288, 38 Am. Dec. 588; Muller v. Eno, 14 N. Y. 597; Rust v. Eckler, 41 N. Y. 488; Foote v. Bentley, 44 N. Y. 166, 4 Am. Rep. 652; see, also, Story Sales, § 421, and cases cited; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595.

In Massachusetts and in Maryland the vendee has his option to retain and use the property and recoup, or sue on his warranty; or he may return it, rescind and sue for the consideration. Dorr v. Fisher, 1 Cush. (Mass.) 271; Bryant v. Isburgh, 13 Gray (Mass.) 607, 74 Am. Dec. 655; Hyatt v. Boyle, 5 Gill & J. (Md.) 121, 25 Am. Dec. 276; Franklin v. Long, 7 Gill & J. (Md.) 407; Rutter v. Blake, 2 Har. & J. (Md.) 353, 3 Am. Dec. 550.

In addition to the mere contract of sale, in an executory as well as on a sale in presenti, a vendor may warrant that the article shall have certain qualities. This agreement to warrant in an executory contract of sale is just as obligatory as a warranty on a present sale and delivery of goods. Is there any reason why the vendee, in such executory contract of sale, may not rely upon that warranty to the same extent as upon a warranty in a present sale and delivery of property?

Had this syrup been all present when purchased, and the plaintiffs (the purchasers) given it all reasonable examination, without any actual trial, there could have been no legal objection to the defendants' warranty, that it would "not crystallize, or the sugar fall down," in its use.

Upon such a warranty the plaintiffs might have used the syrup without returning it, though found to be defective, and relied upon their warranty. This is well-settled law. Why might they not likewise rely upon a like warranty in this executory contract?

I confess myself unable to see any controlling reason for a legal difference. In a present sale with warranty it is expected, of course, that the vendor incurs the peril of defects being developed in the property warranted, after its delivery to the purchaser. He warrants against that. He does precisely the same upon a warranty in an executory contract.

If it be dangerous to allow this defect to be discovered by the purchaser in the one case, without any return of the property, it is no more so in the other.

I see no reason why the same rights and remedies should not attach to a warranty in an executory as in a present sale, and no greater. The purchaser in an executory sale could not rely upon a warranty as to open, plainly apparent defects any more than he could in a sale in presenti.

The appellant greatly relies upon the nisi prius case of Hopkins v. Appleby, 1 Stark. 388, tried before Lord Ellenborough, which was an action for goods sold and delivered, warranted to be of the best quality Spanish barilla and salt barilla. The defendant had consumed the article purchased, in eight successive boilings, without giving notice of its defect or offering to return it; and he attempted to show that the quality could not be ascertained by mere inspection without actual experiment. Proof to the reverse of this was also given. The court held that he ought to have given notice of the defect in an early stage, so that the vendor might have sent there and ascertained the cause of the failure; and he disallowed the claim.

That case has not been followed in the English courts. It is distinctly overruled in Poulton v. Lattimore, 9 Barn. & Cress. 259. There the buyer neither returned the seed bought nor gave any notice of its defect; but as there was an express warranty, the defects, by the breach thereof, were allowed to defeat the action for the price. This in 1829.

Nor does it seem to have been the law of England prior to that decision. Filder v. Starkin, 1 H. Bl. 17; and see Story Sales, § 405, and cases there cited; also § 422, and note 2, and cases cited.

The counsel also insists that the cases of Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; McCormick v. Sarsons, 45 N. Y. 265, 6

Am. Rep. 80, and cases there referred to, sustain this nonsuit. Neither was a case of warranty; and each one that speaks upon the subject, expressly excepts the rule there laid down from a case of warranty as inapplicable.

In Neaffie v. Hart, 4 Lans. 4, there was claimed to have been an implied warranty. The court held that it was not taken out of the rule of the above cases.

In my opinion, where there is an express warranty the purchaser, whether in an executed or an executory sale, is not bound to return the property upon discovering the breach, even if he have the right to do so.

See the cases as to the right to return property purchased upon warranty, before cited; also those from Massachusetts and from Maryland; also Messenger v. Platt, 3 Lans. 234. All agree that he is not bound to return property warranted upon discovering the breach. Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305, would have been decided the other way had there been an express warranty as to the quality of the tobacco. The court held there was no warranty, and that was the ground of the judgment.

Foot v. Bentley, 44 N. Y. 166, 4 Am. Rep. 652, substantially decides this case. The action in respect to the warranty was held to lie, though the tea was not returned when its defects were discovered; but the judgment was reversed upon another ground. Muller v. Eno, 14 N. Y. 597.

The maintenance of this action does not at all conflict with Hopkins v. Appleby, supra. Here notice was given of the defects in the syrup at an early stage, and the defendants promised to attend to it. They also apparently acquiesced in the plaintiffs' use of it, virtually promising to make it right if it did not prove to be sound rock-candy syrup. It would scarcely be just now to allow the defendants to take advantage of the non-return of the syrup under such circumstances.

Of course, there is no danger of fraud and false claims, even where there is an express warranty, when notice is not early given of the defect. It leads the buyer into temptation. Hence, juries should listen to such claims (never presented when their falsity could have been ascertained) with great caution. The proof thereof should be more clear than if the buyer had acted with the frankness of an honest man willing to allow his claims to be tested. This is so declared by courts, while the rule is maintained as to an express warranty as above stated.

The order of the General Term granting a new trial is therefore affirmed, and judgment absolute given for the plaintiffs.

Grover, Folger, and Rapallo, JJ., concur. Church, C. J., and Allen and Andrews, JJ., dissent.

Order affirmed and judgment accordingly.[39]

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[39] An excellent recent case on the right of the buyer, after acceptance, to sue for breach of an express warranty is North Alaska Salmon Co. v. Hobbs,

## MORSE et al. v. MOORE.

(Supreme Judicial Court of Maine, 1891. 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783.)

PETERS, C. J.[40] The controversy in this case grows out of an agreement between plaintiffs and defendant, made and delivered in this state, which runs as follows: "This agreement, made and entered into this seventh day of January, 1888, by and between Morse & Sawyer, of Bath, Maine, of the first part, and Warner Moore, of Richmond, Va., of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and agree to deliver at their wharves at Water Cove, (Cape Small Point, opposite Burnt Coat island, as seen in Coast Chart No. 6, from four to six miles west of Seguin Island lighthouse,) Maine, after the ice has become twelve inches in thickness, of good quality, during the months of January or February, 1888, two thousand tons of good, clear, merchantable ice, not less than twelve inches in thickness, to be weighed by a sworn weigher, with all the proper fitting material necessary for the voyage included, at the price or rate of forty cents per ton of two thousand pounds. Each cargo to be paid for on presentation of sight draft or note for thirty days or sixty days, as may suit party of second part, for the amount accompanying bill of lading and weigher's certificate of said cargo. Cakes to be twenty-two by thirty inches."

The ice delivered under this contract was shipped to Richmond, Va., where the defendant resides, to be sold in that market to his customers. It was to be paid for according to its weight and quality at the port of shipment in Maine, any deterioration of the article during transit being at the risk of the purchaser.

The first question submitted to the jury was whether the ice had been accepted by the defendant or not, and that was decided in favor of the plaintiffs.

That brought up the question whether, having accepted the ice, the defendant could rely on a breach of the warranty of the quality of the ice to reduce the claim of the plaintiff, who sues in this action of indebitatus assumpsit for the contract price; the defendant alleging that the ice was not, at the time and place of delivery in Maine, of the quality called for by the contract.

The judge presiding, being of the impression that such a defense might be admissible in case of an executed agreement containing warranty, but not where the agreement is executory, ruled out the defense as a matter of law. It is to be noticed that the ruling was with-

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Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501 (1911).

[40] The statement of facts and part of the opinion are omitted.

out qualification, admitting of no inquiry into the circumstances in which the ice was accepted. It determines that an acceptance in a case of this kind (in the absence of fraud, of course) absolutely terminates the obligation of the vendor. The judge further ruled that "when the defendant took [that is, by a hired carrier] the property and carried it away the property passed to him."

Our examination of this question leads us to the conclusion that the position of the defendant was well taken, and that the alleged defense should have been permitted to him.

That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books as executory warranty, a condition precedent amounting to warranty, in the nature of warranty, with the effect of warranty, equal to warranty, and the like. It is immaterial, for present purpose, whether it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally—our own cases included—that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract if relied upon at the time by the purchaser. Bryant v. Crosby, 40 Me. 9; Randall v. Thornton, 43 Me. 226, 69 Am. Dec. 56; Hillman v. Wilcox, 30 Me. 170; Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455, and cases cited. Here there is a clear description of both the kind and quality of the ice,—the quality to be merchantable.

It was conceded at the trial that the position relied on by the defense would be legitimate were it an executed, instead of executory, contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule that in an executory contract any article of a particular quality may be tendered in the performance of the contract, and the vendee must see if the article agrees with the terms of the contract, while in an executed sale the agreement is that a particular article actually delivered possesses the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of contract, but it does not impress us that there should be such an essential difference in their effect.

The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract and not in the other. Each vendor makes virtually the same warranty, and the two vendors at the point of delivery would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified; and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty. Prof. Wharton (Whart. Cont. § 564) expresses the idea in these words: "A substantial, though partial (defective) performance of a condition precedent, followed by acceptance on the other side, transmutes the condition precedent into a representation (implying warranty,) not barring a suit on the contract, though leaving ground for a cross-action for damages."

Executory and executed contracts are very much alike in the elements that enter into them. There are executory steps in all executed contracts. A bargain precedes the sale. If there be a warranty, that is usually first a part of the bargain, and afterwards of the sale. So in an executory contract the warranty is part of the agreement of sale, and at delivery a part of the sale. Many contracts commonly spoken of as executed contracts are really wholly or partially executory. All orders for goods, whether for present or future delivery, are of an executory nature. All sales by sample are such. The author of Smith's Leading Cases (8th Ed.) vol. 1, pt. 1, p. 339, says in discussing this distinction: "Where the vendor agrees to sell goods of a certain kind, without designating or referring to any specific chattel, the contract is essentially executory, whether it purports to be a present transfer or a mere undertaking to deliver at a future period, and the right of property does not pass until the merchandise is delivered to or set apart for the purchaser." Every contract is executory on the one side or the other until the party has done what he has agreed to do.

The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond; evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court.

The law of waiver more commonly applies to things that are not essential to a substantial execution of the contract; often such as relate to the time, place, or manner of performance, or that affect merely the taste or fancy, perhaps, and are such departures from literal performance as do not bring loss or injury upon the purchaser. Baldwin v. Farnsworth, 10 Me. 414, 25 Am. Dec. 252; Lamb v. Barnard, 16 Me. 364.

We think the rule invoked by the defendant a just one. Speaking generally, it is the safer rule for both buyer and seller. The opposite rule imposes on either of them very great responsibility and risk. It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although even much inferior in quality to the description contained in the contract. Certainly it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance.

The present case illustrates the justness of the rule, if the facts are proved as the defendant alleges them. The plaintiffs agreed to deliver ice, which they warranted should be good, clear, and merchantable. Two cargoes were loaded for shipment to a southern port. Defendant furnished the vessels, though they were probably chartered by the plaintiffs on the defendant's account. There is nothing in the charge of the judge, in the exceptions, or on briefs of counsel, intimating that the defendant ever saw the ice, either by agent or personally, until it arrived in Virginia, or that he was notified to be present, or knew of the delivery at the time of it. It would seem to be a rather stringent construction of the contract that the defendant must watch the loading of the cargoes, upon the penalty, if he failed to do so, of having to pay full price for whatever defective ice might be delivered behind his back, after he had taken for his protection, and paying for it in the consideration of the contract, an agreement of warranty in such positive terms.

Still it may be that the plaintiffs could legally refuse to deliver the ice unless the defendant after notice should be present to receive it. The cargoes, after reasonable passages, arrived in a very unmerchantable condition. There was no lack of objection or protest from the defendant. He wrote repeatedly, and telegraphed the plaintiffs, expressing his disappointment, and asking their advice as to the disposition of the ice. But no satisfactory answer came. What should he do? There was no possibility of reshipment, nor could the ice be preserved in that climate without the protection that his own ice-houses would afford for such purpose. Storage in any ordinary manner could not possibly save the property. He stored the ice, and sold it by enterprising expedients as rapidly as possible. He alleges that it was late spring ice, of poor texture, and in proximately worthless condition when shipped from Maine. If that can be shown by witnesses and in court at the home of the plaintiffs, it would seem to be an injustice if the defendant is not permitted to make the defense. * * *

Exceptions sustained.[41]

## GINN et al. v. W. C. CLARK COAL CO.

(Supreme Court of Michigan, 1906. 143 Mich. 84, 106 N. W. 867.)

Carpenter, C. J.[42] Plaintiffs and defendant entered into a written contract whereby the former agreed to sell, and the latter to buy, 60 cars of coal—described in the contract as Pine Grove coal—to be delivered two cars each day, commencing October 15, 1902. Defendant received 19 of these cars, and refused to receive other cars, upon the ground that the coal shipped was not Pine Grove coal. After some negotiations, which will be hereinafter stated with more detail, defendant paid for the coal received, and refused to pay damages for that which it refused to receive. Plaintiffs brought this suit and recovered damages in the court below. * * *

Defendant complains because the trial court excluded certain testimony offered by it for the purpose of proving that the coal rejected was not of a merchantable quality. The trial court had a right to understand that defendant sought to introduce this testimony, not for the purpose of reducing damages, but solely for the purpose of justifying its rejection of the coal. As this court reviews upon writs of error only questions raised in the trial court, the question for our determination is: Was this testimony admissible to justify the rejection of the coal? Defendant, after having a full opportunity to examine the coal, notified plaintiffs that they rejected the same for a certain specific ground, viz., the coal was not Pine Grove coal. Plaintiffs had a right to act upon the assumption that this was the only ground upon which defendant relied, and it would be unjust to permit defendant to rely upon other grounds on the trial of this case. This precise question was determined in Littlejohn v. Shaw, 159 N. Y. 188, 53 N. E. 810. There defendant rejected 25 tons of No. 1 cube gambier, which it had agreed to purchase from plaintiff, "for two reasons, first, because they are not good merchantable quality and again because they are not in good merchantable condition." Upon a suit brought to recover damages it was insisted that it was incumbent upon plaintiff "to prove that all the terms of the contract were fulfilled upon their part." This was denied by the court, who said that defendants, by "formally stating their objections, must be held to have waived all other objections." * * *

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[41] See, also, Campion v. Marston, 99 Me. 410, 59 Atl. 548 (1904), reported herein ante, p. 370.

[42] Part of the opinion is omitted.

Judgment affirmed with costs.[43]

## DESCALZI FRUIT CO. v. WILLIAM S. SWEET & SON, Inc.

(Supreme Court of Rhode Island, 1910. 30 R. I. 320, 75 Atl. 308, 27 L. R. A. [N. S.] 932, 136 Am. St. Rep. 961.)

DUBOIS, C. J. This is an action of assumpsit, brought by the plaintiffs, copartners in trade, doing business under the firm name of the Descalzi Fruit Company, and all of Pittsburg, in the state of Pennsylvania, against the defendant, a corporation of the state of Rhode Island, located at Providence therein, to recover the price of a car load of peaches sold by the plaintiffs to the defendant. After verdict for the defendant in the superior court, the case was brought to this court upon the plaintiffs' bill of exceptions.

The plaintiffs, dealers in fruit, having a place of business in the town of Fort Valley, Ga., agreed by telegraph to deliver to the defendant in Providence a car load of peaches, known as "fancy Belles and Thurbers," at $2.25 a carrier. The telegrams comprising the agreement, arranged in their chronological order, are as follows: Defendant to plaintiffs: "July 11th, 1907, Quote price, car, fancy red fruit Belles and Thurbers." Plaintiffs to defendant: "July 11th. Wire received offer fancy Belles Thurbers to-morrow's shipment $2.25." Defendant to plaintiffs: "July 12th. Ship car fancy stock your price want best colored stock possible." Plaintiffs to defendant (night message): "F. G. E. #18943 (443) carriers fine Belles and few Elbertas." Defendant to plaintiffs: "July 13th. Can't use Elbertas at price and Belles must be fancy high colored expected part Thurbers." Plaintiffs to defendant: "July 13th. Wire received just 15 Elbertas mostly fancy Belles few Thurbers car will please you." When the car arrived in Providence the defendant examined the peaches and found that they were not as ordered, and immediately wired the plaintiffs as follows: "July 16th. Arrived and opens unsatisfactory reject car because quality not as ordered advise directing without delay Boston this market will not take this quality satisfactory." To which the plaintiffs replied as follows: "Car yours care not what you do with it gave you best colored stock possible as ordered and hold you responsible for amount draft." Whereupon the defendant sent this final dispatch to plaintiffs: "Will not accept using best judgment for you forwarded Boston."

It appears that before sending the car to Boston, Mass., the defendant ascertained that Curtis & Co., commission merchants in that city, sold goods for the plaintiffs, and thereupon the defendant communicated with them, advising them that it had a car load of peaches which could not be disposed of in the Providence market, and inquired if this car of fruit could be sold in the Boston market. Receiving an affirmative reply, the defendant forwarded the car to Curtis & Co., with instructions to sell the peaches for the benefit of the plaintiffs and to forward the proceeds of sale to them. Curtis & Co., upon arrival of the aforesaid car, sold the fruit and sent the proceeds to the plaintiffs, who declined to receive the same. The parties have stipulated that the following facts be taken by the court as proved for the purposes of this decision:

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[43] Compare Green v. Edgar, 21 Hun, 414 (1880); Williams Cooperage Co. v. Scofield, 115 Fed. 119, 53 C. C. A. 23 (1902).

"(1) The goods in question were sold by Curtis & Co., of Boston, to whom the defendant sent the goods, for the sum of six hundred and thirty-eight dollars and thirteen cents ($638.13).

"(2) The aforesaid Curtis & Co. deducted the following items from the gross receipts of said sale:

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|---|---|
| Freight from Fort Valley to Boston | $362.63 |
| Expense of unloading said goods | 13.44 |
| Commission of Curtis & Company | 44.67 |
| | $420.74 |

"(3) The balance, after deducting said items, to wit, two hundred and seventeen dollars and thirty-nine cents ($217.39), was tendered to said plaintiffs before the bringing of said action by said Curtis & Co., and also by said defendant. It is further agreed that, assuming that the defendant had the right to dispose of the goods through Curtis & Co. as aforesaid, the said charges of Curtis & Co. so deducted as aforesaid are reasonable and proper. It is also agreed that the said defendant has never received any benefit or interest whatever from the use of the aforesaid two hundred and seventeen dollars and thirty-nine cents ($217.39), which were the net proceeds of the sale."

The plaintiffs contend that, even if the peaches shipped by them were not of the quality contracted for, the defendant, by causing the goods to be resold for the benefit of the plaintiffs, exercised such a dominion over them as to constitute an acceptance of the same. The defendant seeks to justify its conduct in causing a resale of the plaintiffs' goods upon two grounds: In the first place, to protect itself against the freight charge; and, in the second place, to save the plaintiffs from a total loss in regard to said fruit.

It is proper to consider the circumstances in which the defendant found itself. It was midsummer when the cargo of peaches, from Georgia, inferior in quality to those for which the defendant had contracted and had a right to expect, arrived in Providence, where there was no market for such fruit. The defendant forthwith notified the plaintiff by telegraph of its refusal to accept them and asked for instructions concerning the disposal of the peaches in Boston, where there was a market for that grade and quality of fruit. The plaintiffs refused to instruct the defendant in the matter, and claimed performance of their part of the contract. The defendant confronted this condition:

A car load of perishable goods, abandoned by the owner, had been left in its charge by the railroad company, which looked to the defendant for payment of the freight. In order to save the goods and protect the owners to any extent, immediate action was imperatively necessary. Ample notice had been given to the owners without avail. Evidently they had doubts as to the sincerity of the defendant's refusal, and were too far away to investigate for themselves. Moreover, they made no attempt to employ any agent to look after their interests in Providence.

The defendant could have rested upon its rights and remained inactive, with the result that, unless the plaintiffs changed their views regarding the matter and took some steps looking toward the disposition of the fruit, or the railroad company sold the same to pay freight charges, or something unlooked for intervened to prevent it, the peaches would have perished without benefit to any one. In the absence of the plaintiffs, unrepresented, the defendant having knowledge of the existing conditions, and having the goods cast upon it in this emergency, not only had the right to protect itself from the freight charges, but also to prevent the owners from needlessly sacrificing their goods without benefit, and at a total loss to themselves, with additional freight charges, through ignorance and obstinacy. "It not infrequently happens that the seller, when notified that the goods are not in conformity with the contract and when requested to remove them, fails to do so, claiming that the contract has been properly fulfilled. Under these circumstances it may be clearly the best thing to do, from a business standpoint, for the buyer, in whose possession the goods are, to sell them at once and leave the question whether the goods fulfilled the terms of the contract or not to subsequent determination. Where goods are perishable, or expensive to keep, or of fluctuating value, any other course is attended with loss to one party or the other. Accordingly it has been held, and it seems reasonable, that the buyer, though refusing to take title because the goods are not what he bargained for, may, after notifying the seller of his rejection and requesting him in vain to remove the goods, resell them on account of the seller." Williston on Sales (1909) § 498. And see Rubin v. Sturtevant, 80 Fed. 930, 26 C. C. A. 259; Hitchcock v. Griffin & Skelley Co., 99 Mich. 447, 58 N. W. 373, 41 Am. St. Rep. 624; Barnett & Co. v. Terry & Smith, 42 Ga. 283.

An application of the Golden Rule is indicated in cases like the present, and for such application the defendant ought not to be penalized through a technicality. As the absent plaintiffs had no agent to take care of their interests, and as it was necessary that their interests should be cared for to save them from loss, the defendant had a right to act as agent for them ex necessitate rei. In such a case the utmost diligence and good faith will be exacted from the person who thus elects to bear the burden of agency. There is nothing in the case at bar to indicate that the defendant has in any manner fallen short of these requirements. The defendant, therefore, was justified in forwarding the fruit to be sold for the benefit of the plaintiffs, and by so doing did not accept the goods.

As it appears by the stipulation hereinbefore set forth that the net proceeds of the sale by Curtis & Co., after deducting the freight and charges therein alluded to, were tendered to the plaintiffs before they brought this action, and also that the defendant has never received any benefit from said proceeds, it follows that the plaintiffs were not entitled to a verdict for any sum whatever in the case at bar.

The plaintiffs' exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

# CHAPTER V

# RIGHTS OF UNPAID SELLER AGAINST THE GOODS

## SECTION 1.—LIEN

### BLOXAM & WARRINGTON v. SANDERS et al.

(Court of King's Bench, 1825. 4 Barn. & C. 941.)

Trover to recover the value of a quantity of hops from the defendants. At the trial before Abbott, C. J., at the London sittings, after last Trinity term, the jury found a verdict for the plaintiffs, damages £3000., subject to the opinion of this court upon the following case:

The plaintiffs were assignees of J. R. Saxby, a bankrupt under a commission of bankrupt duly issued against him on the 5th of January, 1824. The act of bankruptcy was committed on the 1st of November, 1823, the bankrupt having on that day surrendered himself to prison, where he lay more than two months. The defendants were hop factors and merchants in the borough of Southwark. Previous to his bankruptcy the bankrupt had been a dealer in hops, and on the 7th, 16th, and 23d of August purchased from the defendants the hops (among others) for which this action was brought. Bought notes were delivered in the following form: "Mr. John Robert Saxby, of Sanders, Parkes & Co. T. M. Simmons, eight pockets at 155s. 8th August, 1823." Part of the hops were weighed, and an account of the weights was delivered to Saxby by the defendants. The samples were given to the bankrupt, and bills of parcels were also delivered to him in which he was made debtor for six different parcels of hops, the amount of which was £739.

The usual time of payment in the trade was the second Saturday subsequent to a purchase. Part of the hops belonged to the defendants, and part they sold as factors, but they sold all in their own names, it being the custom in the hop trade to do so. It was proved that the bankrupt had said more than once that the hops were to remain in the defendants' hands till paid for and that he said so when he was about buying one of the parcels of hops for which the action was brought. The bankrupt did not pay for the hops, and on the 6th of September, 1823, the defendants wrote to the bankrupt, and desired him to "take notice, that unless he paid for the hops they had sold him, on or before Tuesday then next, the defendants would proceed to resell them, holding him accountable for any loss which might arise in consequence thereof."

Before the bankruptcy the defendants did not sell any parcel of hops without the bankrupt's express assent. After the notice already stated the defendants sold some parcels of the hops, but in one instance the bankrupt refused to allow the defendants to sell a parcel of hops to a person named by them at the price offered, and that parcel was accordingly sold by the defendants, before Saxby's bankruptcy, to another person by Saxby's authority. On another occasion in the month of September the bankrupt had employed a broker to sell another parcel of the hops, but the defendants refused to deliver them without being paid for them. After the act of bankruptcy the defendants sold hops of the bankrupts to the amount of £380. 19s. 5d. The defendants delivered account sales of the hops so sold by them after the bankruptcy. The hops were stated to be sold for Saxby, and he was charged warehouse rent from the 30th of August, and also commission on the sales.

Besides the hops purchased from the defendants, the bankrupt placed in their warehouse nineteen pockets of hops for sale by them (as factors,) of which fifteen pockets were sold on and after the 13th of January, 1824, of the value of £77. 19s. 5d., and of which four remained in their warehouse at the time of the trial, which four were of the value of £14., and there were also unsold of the hops purchased from defendants seven bags, fifty-six pockets, of the value of £251. 13s. 6d. There was a demand by plaintiffs of these hops, and a tender of warehouse rent and charges, and a refusal on the part of the defendants to deliver them, before action brought. The jury found that the defendants did not rescind the sales made by them to the bankrupt.

Bayley, J., now delivered the judgment of the court. This was an action of trover for certain quantities of hops sold by the defendants to Saxby, before his bankruptcy, and for certain other hops which Saxby, had placed in defendants' warehouses, that defendants in their character of factors might sell them for his use, and the question as to this latter parcel stands upon perfectly distinct grounds from the question as to the others. This parcel consisted of nineteen pockets; defendants sold none of them until after Saxby's bankruptcy, and then they sold fifteen pockets, not for the use of the assignees, but to apply the proceeds, not for any debt due to them in their character of factors, but to discharge a claim they considered themselves as having upon Saxby, in regard to the other hops; and the other four pockets they refused to deliver to the assignees. It was candidly admitted upon the argument, and was clear beyond all doubt, that the defendants were not warranted in applying the proceeds of the fifteen pockets, to the purpose to which they attempted to apply them, and that they had no legal ground for withholding the four pockets; and therefore, to the extent of these nineteen pockets, the value of which is £91. 19s. 5d., we think it clear, that the plaintiffs are entitled to recover.

The other quantities were hops Saxby had bargained to buy of the defendants on different days in August, 1823, and for which defendants had delivered, bought notes to Saxby. The bought notes were in this form: "Mr. J. R. Saxby, of Sanders, Parkes & Co., T. M. Simmons, eight pockets at 155s., 8th of August, 1823." Part of the hops were weighed, and an account delivered to Saxby, of the weights, and samples were given to Saxby, and invoices delivered. The bought notes were silent as to the time for delivering the hops, and also as to the time for paying for them, but the usual time for paying for hops, was proved to be the second Saturday, after the purchase. It was also proved that Saxby, had said that the hops were to remain with the defendants, till they were paid for; but as the admissibility of such evidence was questioned, and in our view of the case it is unnecessary to decide that point, I only mention it to dismiss it. (The learned Judge then stated the other facts set out in the special case, and then proceeded as follows:)

Under these circumstances the question is, whether in respect of these hops, the plaintiffs are entitled to recover. It was urged, on the part of the plaintiffs, that the sale of these hops, vested the property in them in Saxby; that the hops were to be considered as sold upon credit, and that defendants had no lien, therefore, upon any of them for the price; that if they ever had any lien, it was destroyed as to those they sold by the act of sale, and that the plaintiffs were entitled to recover the full value of what were sold, without making any deduction for the price which was unpaid. It is, therefore, material to consider whether the property vested in Saxby, to any and to what extent; and what were the respective rights of Saxby, and of the defendants. Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. The buyer's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession, Tooke v. Hollingsworth, 5 T. R. 215.

Whether default in payment when the credit expires, will destroy his right of possession, if he has not before that time obtained actual possession and put him in the same situation as if there had been no bargain for credit, it is not now necessary to enquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear, Hanson v. Meyer, 6 East, 614. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them in transitu, Mason v. Lickbarrow, 1 H. Bl. 357, Ellis v. Hunt, 3 T. R. 464, Hodgson v. Loy, 7 T. R. 440, Inglis and Others v. Usherwood, 1 East, 515, Bothlingk v. Inglis, 3 East, 381. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in transitu a fortiori, is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession, are both requisite, unless they have both those rights, Gordon v. Harper, 7 T. R. 9.

Trover is an action of that description, it requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expense, but that charge gave him no better right of possession than he would have had if that charge had not been made. Indeed that charge was not made until after the bankruptcy, and until the defendants insisted that the right of possession was transferred to their second vendee. Then as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby, from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price. As that price has not been paid or tendered, we are of opinion that this action, which is not an action for special damage by a wrongful sale, but an action of trover cannot, as to those hops, be maintained. The verdict must, therefore, be for the plaintiffs for the sum of £91. 19s. 5d. only.

Judgment for the plaintiff.

## McELWEE et al. v. METROPOLITAN LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit, 1895. 69 Fed. 302, 16 C. C. A. 232.)

Replevin by McElwee & Carney to recover a quantity of lumber alleged to have been sold by the defendant to S. B. Barker & Co. and by S. B. Barker & Co. to the plaintiffs. Judgment below was for the defendant, and the plaintiffs sued out a writ of error.[1]

The facts, so far as it is necessary to state them here, were as follows:

In May, 1892, the Metropolitan Lumber Company made a contract with S. B. Barker & Co. for the sale to them of all the product of its mill during the season of 1892. By the terms of this contract the amount of lumber manufactured each month was to be determined by inspectors on the first of the succeeding month, and Barker & Co. were to give their notes due in 90 days for the price, less the freight from the lumber company's mill to Chicago. It was further provided that, if Barker & Co. did not desire the lumber shipped as fast as made, the lumber company would renew their notes for the price so long as the lumber remained in its possession, not exceeding 90 days. At the close of the season, on November 12, 1892, a considerable quantity of lumber remained in possession of the lumber company, for which notes were outstanding, having been discounted by the lumber company. In January, 1893, Barker & Co. requested renewals of such notes, under the clause in the contract providing therefor, and new notes were given, maturing in May, June, and July. On May 30th, Barker & Co. failed, and the lumber company at once asserted a right to retain the lumber remaining in its possession. It was claimed by the plaintiffs that on November 14, 1892, which was shortly after the close of the season, in consideration of Barker & Co.'s executing a note for the lumber manufactured in November at once, instead of waiting until the 1st of the succeeding month, the lumber company had agreed to turn over to Barker & Co. all its right and title to the lumber on hand, and had thereafter held such lumber as bailee of Barker & Co.

Lurton, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Though the agreement was originally executory, being for the sale of lumber to be manufactured, yet, when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus designated. That particular lumber became appropriated to the contract, and the vendee under the agreement was obliged to make his promissory note to the vendor for the price, payable 90 days after date. The element necessary to a perfect and complete sale was supplied by the appropriation of a particular lot of lumber to the contract. In the absence of a contrary intention, clearly expressed by other parts of the contract, the right of property and of possession would vest in the buyer upon the execution of his promissory note payable to the seller. The provision for a final inspection at Escanaba after the delivery had begun was merely for the correction of errors before final settlement, and does not operate to defeat the presumption that title passed when the lumber was first inspected and accepted and conditional payment made. Macomber v. Parker, 13 Pick. (Mass.) 183; Cotton Press Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255.

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[1] The statement of facts is abridged, and part of the opinion is omitted.

To say that title remained with the vendor after the lumber had been appropriated to the contract and accepted by the buyer, and after the negotiable notes of the vendee had been delivered in settlement, would leave the vendor liable for loss by fire or other casualty, and the vendee without security for the payment he had made. The clause concerning the risk, from fire, of lumber carried over from the season of 1892, was not interpreted by the defendant in error as leaving the risk with the defendant during the season; for the insurance carried in its own name was, by its own procurement, made payable to Barker & Co., to the extent of their interest. It may be added that, at the date when the right of plaintiffs in error accrued, this insurance had been transferred to Barker & Co. as owners, and was being carried by them. Neither did the provision that the vendor should deliver at Chicago prevent the title from passing before such delivery. Undoubtedly, the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery. The Venus, 8 Cranch, 275, 3 L. Ed. 553; Sneathen v. Grubbs, 88 Pa. 147; Benj. Sales, §§ 325, 377; Com. v. Greenfield, 121 Mass. 40.

"Slight evidence," says Mr. Benjamin, "is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances." Benj. Sales, § 329. Here the lumber cut, inspected, and measured was completely identified. Nothing more remained to be done to put it in a deliverable condition. It was then paid for. The delivery might be delayed by the neglect of the seller, or for the convenience of the buyer. In paying for the lumber, the price of the freight was deducted. Under such circumstances, it would be difficult to say that, if the lumber should be destroyed without fault of the seller, the loss would not fall on the buyer.

Terry v. Wheeler, 25 N. Y. 520, is much in point. That was a case of the sale of lumber which was selected by the buyer, and measured and piled in the yard of the seller, and the price was paid. The seller, however, agreed, as part of the contract, to deliver the lumber free of charge on board of the cars, no time being specified. The lumber was destroyed by fire on the day of sale, and the buyer sued to recover his purchase money. Selden, J., said: "No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after the delivery, at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee and not as owner." Hobbs v. Carr, 127 Mass. 532; Weld v. Came, 98 Mass. 152; Lingham v. Eggleston, 27 Mich. 324; Underhill v. Booming Co., 40 Mich. 660; Booming Co. v. Underhill, 43 Mich. 629, 5 N. W. 1073; Steam Mill Co. v. Brown, 57 Me. 9 [99 Am. Dec. 752]; Hatch v. Oil Co., 100 U. S. 135 [25 L. Ed. 554]; Dyer v. Libby, 61 Me. 45.

The passage of title does not militate against the existence of a vendor's lien. Such a lien arises upon the vesting of the title in the vendee, and is a mere right of the vendor to retain possession until the price is paid. If the title remains with the vendor, there is no lien; and this was explicitly stated to the jury, who distinctly found in their general verdict that the appellee had a vendor's lien. If such a lien existed when appellants replevied the lumber involved, it arose in consequence of facts occurring after the vendee gave his original notes. The agreement to give credit for 90 days after each installment of lumber was placed in a deliverable condition, and had been inspected and estimated, was wholly inconsistent with any right of the vendor to retain possession until the price was paid. The duty of immediate delivery, credit having been given, was wholly inconsistent with a right to hold as security for the purchase price. "Selling goods on a credit means ex vi terminorum that the buyer is to take them in his possession, and the vendor is to trust to the buyer's promise for the payment of the price at a future time." Benj. Sales (Corb. Ed.) § 1182.

The doctrine is well stated in the leading English cases of Bloxam v. Sanders, 4 Barn. & C. 941, and Bloxam v. Morley, 4 Barn. & C. 951, by Bayley, J., who thus stated the general principles concerning the lien of a vendor of goods: "The vendor's right in respect of his price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Tooke v. Hollingworth, 5 Term R. 215. If the seller has dispatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property is vested in the buyer so as to subject him to the risk of any accident. But he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats the right. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price; or they may still act on their right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and the right of possession are both requisite, unless they have both those rights."

Thus, after the execution to the vendor of the promissory notes of the vendee, the title or right of property and the right of possession to the lumber embraced within each monthly settlement were vested in Barker & Co. The actual, manual possession was with the Metropolitan Lumber Company, which was under obligation to deliver to the buyer as delivery should be required. Delivery could not be refused unless one of two things should occur before the actual possession was surrendered, namely, insolvency of the buyer or nonpayment of the price when the credit expired. In case of the happening of either of these contingencies before the actual possession of the lumber passed from the seller to the buyer, the vendor's lien, which had been waived by a sale on a credit, would revive, and the vendor might lawfully retain his possession until the price was paid. Even if goods have been delivered to a carrier consigned to the vendee, and insolvency occurs before they reach the actual possession of the buyer, the vendor may exercise the right of stoppage in transitu to recover his possession, and thereby revive his lien. * * *

Unless, therefore, the actual possession had been surrendered before the alleged change in the contract, to be hereafter considered, the vendor's lien would revive, in case insolvency occurred before delivery or the period of credit expired and the price was unpaid. The effect upon the vendor's right of the expiration of the period of credit while the actual possession is with the vendor is thus stated: "When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent." Benj. Sales (Corb. Ed.) § 1227.

This revesting of the lien is not affected by the fact that the seller had received conditional payment by promissory notes or bills of exchange, nor by the fact that such notes or bills had been negotiated so that they were outstanding when they matured, or unmatured and outstanding when the insolvency occurred. Benj. Sales (Corb. Ed.) §§ 1130–1185, and note 4; Valpy v. Oakeley, 16 Q. B. 941; Griffiths v. Perry, 1 El. & El. 680; Grice v. Richardson, L. R. 3 App. Cas. 319; White v. Welsh, 38 Pa. 420; Wanamaker v. Yerkes, 70 Pa. 443; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Townley v. Crump, 4 Adol. & E. 58. The liability of defendant in error as indorser on such notes as had been negotiated operated to continue the relation of an unpaid vendor. The right of retention is not a right of rescission, and it is not essential to the revival of the lien that the notes of the purchaser shall be delivered up or ready for delivery, though in Arnold v. Delano, cited above, it seems to have been so regarded. If, after the revival of the vendor's lien by expiration of the credit, the seller extended further credit by taking renewal notes, payable at a future date, the revived lien would be waived, unless there was some agreement that this further credit should not have that effect, and that the seller should hold the property as security for the renewal notes.

This state of things seems to have been contemplated by the parties; for, by one of the clauses of the original contract, a provision was made for renewals or extensions for such time as the lumber in the actual possession of the vendor when an extension was granted should "remain in the possession" of the lumber company, "not exceeding ninety days." The reasonable construction to be placed upon this provision is that the revived lien, resulting from the expiration of the original credit, should not be waived by renewal of purchase notes and an extension of credit. Before such extension, the buyer undoubtedly had the right of property and right of possession. After such renewals, all right of possession till the renewal notes were paid was lost. Independently of the agreement that extended credit should not waive the lien which had been revived by expiration of original credit, the insolvency which occurred during the running of the renewal notes would operate to revive the suspended lien, and, between vendor and vendee, or a subvendee standing on no higher ground than the vendee, the defendant in error had a right to hold the possession till the renewal notes were paid. The authorities already cited fully sustain this position.

Aside from all questions arising on the alleged modification of November 14, 1892, and all questions of estoppel, the rights of the defendant in error, in the actual possession of lumber which had not been paid for, would not be affected by a sale to a third person. Such a subvendee would buy subject to the right of the vendor to hold possession as security for renewal notes; and, without regard to this special agreement, a subvendee would take subject to the possibility that before possession was obtained the lien might be revived by insolvency of the vendee or expiration of the stipulated credit. These considerations lead us to the conclusion that the rights of the plaintiffs in error, as subvendees, must, as the learned judge who presided at nisi prius instructed the jury, depend either upon questions of estoppel or upon the legal effect of the modification in the contract as defeating any right of lien in the vendor. The construction given the original contract that the title did not vest in the purchaser till delivery at Chicago, though erroneous, was harmless. It is a matter of no moment to plaintiffs in error whether the defendant in error had a right of retention by reason of the fact that it had not parted with the title or because it had a vendor's lien. In either case, plaintiffs in error must fail in this action. * * *

This brings us to the legal effect of the alleged modifications of November 14, 1892, upon the rights of the parties. * * * There is no evidence in this record which would justify a finding that there was an agreement that, after the modifications of November 14th, the vendors should no longer remain in possession as vendors, but should thereafter hold as agent or bailee for Barker & Co. Upon the contrary, the construction placed upon the agreement, after the alleged modifications, by both parties, was wholly inconsistent with any change in the character in which the vendor remained in the actual possession. The claim of Barker & Co. for an extension of credit was made upon the clause providing for renewals while the vendors remained in possession, and the whole correspondence was based upon the theory that the lumber would stand as a security for the renewal notes.

On the evidence before the jury, it was not error to assume, as the trial judge did, that at the occurrence of the vendee's insolvency, there had been no delivery to the vendee, either actual or constructive. Neither do we think that it would follow, if there was such evidence, that a mere agreement, express or implied, by an unpaid vendor, to hold possession as bailee or agent for the vendee, would operate as such a delivery to the vendee as to prevent the revivor of the vendor's lien if the vendee should fail before the actual possession was lost. It is to be borne in mind that this right of the vendor springs out of the relation of the parties and the natural equity that the vendor shall not be compelled to complete a contract by delivery when the vendee has not paid the price, or by insolvency becomes unable to carry out his side of the agreement. As put by Bayley, B., in Miles v. Gorton, 2 Cromp. & M. 511: "Although everything may have been done so as to divest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until the payment of the price."

The case of Barrett v. Goddard, where the opinion was by Justice Story on circuit, and reported as No. 1,046, Fed. Cas., is much relied upon by plaintiffs in error. That case is, however, exceptional, and is founded for the most part on Hurry v. Mangles, 1 Camp. 452, where the rights of a subvendee had intervened, who had bought and paid for the goods, and then paid rent to the vendor as warehouseman. In Miles v. Gorton, 2 Cromp. & M. 506, Hurry v. Mangles was distinguished, upon the ground that the vendor, by receiving rent from a subvendee, had delivered the goods to the subvendee, and thereafter held as agent for the subvendee and not as agent for the vendee. The other cases cited by Justice Story are cases where the question was one of delivery to the vendee under the statute of frauds, and are applicable only in respect of questions upon the formation of the contract. There is a clear distinction between a delivery which will suffice to take a case without the statute of frauds, and an agreement of a vendor to hold in the character of bailee for the vendee, as a delivery sufficient to divest the vendor's lien or prevent its revival on insolvency or expiration of period of credit. Benj. Sales (Corb. Ed.) §§ 1131–1134, 1187; Miles v. Gorton, 2 Cromp. & M. 504; Hurry v. Mangles, 1 Camp. 452; Tanner v. Scovell, 14 Mees. & W. 28–37; Townley v. Crump, 4 Adol. & E. 58; Grice v. Richardson, L. R. 3 App. Cas. 319.

The case last cited is an opinion of the house of lords, and was decided as late as 1877. The doctrine of Miles v. Gorton, heretofore cited, was distinctly affirmed. In that case it appeared that the vendors were warehousemen, and made an arrangement with the purchasers that they should pay warehouse rent, and the sale was on a credit. It was held—First, that unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignee of the purchaser in the event of insolvency; second, that, as the goods remained in the possession of the vendors, and no actual delivery had been made to the purchaser, the vendors' lien revived upon the insolvency of the vendee, notwithstanding the vendors had become bailees for the vendee. The case was argued by Mr. Benjamin, the learned author of the work on Sales of Personal Property, in favor of the view announced by the house of lords. Other English cases bearing upon the question are: Dodsley v. Varley, 12 Adol. & E. 632; Valpy v. Oakeley, 16 Q. B. 941; McEwan v. Smith, 2 H. L. Cas. 309. * * *

Entertaining these views, it is clear that, if the defendant in error is debarred from asserting a vendor's lien upon the insolvency of the vendee, it must be because the plaintiffs in error have acquired rights as subpurchasers which the vendor is estopped to deny or contravene by the assertion of a lien. What are these rights, and what is their origin? As mere subpurchasers of lumber in the actual possession of the vendor, they only acquire the right and interest of the vendee. If, at the time they bought, the vendor had no lien, no right of retention, then they would acquire the right to demand delivery. But the right of a vendee who has bought on a credit is not an absolute right to demand delivery. The right is dependent upon the preservation of his credit, and, if he becomes insolvent before he obtains actual possession, the lien of the vendor revives, and the insolvent vendee must pay the purchase price before he can deprive the vendor of the goods remaining in his possession. So, if the vendor, for any reason, remain in the actual possession until the period of credit has expired, his lien revives. Now, a subvendee buys only this defeasible right of the vendee; and, if he does not obtain the actual possession or obtain from the vendor an actual attornment to him, as is Hurry v. Mangles, cited heretofore, and the credit given the vendee expires while the vendor holds the actual possession, or the vendee becomes insolvent, he cannot, in the absence of some estoppel, deprive the unpaid vendor of his actual possession.

The rights of subvendees have most often been under consideration in cases involving the doctrine of stoppage in transitu. But the principle is the same where transit has not begun. It was well said in White v. Welsh, 38 Pa. 420, that, "if a vendor has a right of stoppage in transitu, a fortiori he has a right of retainer before any transit has begun." Now the right of stoppage in transitu, special legislation out of the way, can only be defeated by the transfer of a bill of lading to an indorsee who bona fide gave value for it. Benj. Sales (Corb. Ed.) § 1285; Lickbarrow v. Mason, 1 Smith, Lead. Cas. (Ed. 1879) 753. It will not be defeated by a mere assignment while in transit, or by an attachment by creditors of vendee. Benj. Sales (Corb. Ed.) § 1242; Mississippi Mills v. Union & Planters' Bank, 9 Lea (Tenn.) 318; White v. Mitchell, 38 Mich. 390; Harris v. Pratt, 17 N. Y. 249; Umber Co. v. O'Brien, 123 Mass. 12–14; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Stanton v. Eager, 16 Pick. (Mass.) 476; Wood v. Yeatman, 15 B. Mon. (Ky.) 273; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17. No subsale during transit will defeat the right, unless the bill of lading be transferred. In the late case of Kemp v. Falk, L. R. 7 App. Cas. 573–582, it was said by Lord Blackburn that "no sale, even if the sale had actually been made with payment, would put an end to the right of stoppage in transitu."

Now, what is the attitude of plaintiffs in error? * * * The best that can be said, favorable to plaintiffs in error, is that on the 5th of June, 1893, they for the first time obtained the title and right of Barker & Co. to the specified lumber involved in this controversy. Before the title to any part of this lumber vested, Barker & Co. had failed. Thereupon, the vendor's lien reattached, even assuming that it had been suspended by reason of the extended credit, and had not been saved as an effect of the stipulation concerning renewals. On this state of facts, the observation of Lord Blackburn, in Kemp v. Falk, L. R. 7 App. Cas. 582, is in point, that: "Why an agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be supposed to put an end to the equitable right to stop them in transitu, I cannot understand." "I am quite clear," adds his lordship, "that it does not."

If we are right in these conclusions, it follows that defendant in error is entitled to assert its vendor's lien, unless still other aspects of the case shall raise an estoppel. * * * [The court held that there was nothing to estop the defendant from asserting its lien, and affirmed the judgment for the defendant.]

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## CRUMMEY v. RAUDENBUSH.

(Supreme Court of Minnesota, 1893. 55 Minn. 426, 56 N. W. 1113.)

This action was brought to recover $225 damages for breach of a contract, of which the following is a copy:

"St. Paul, April 2, 1889.

"Received of George B. Crummey one Schumacher square piano at $225.00 in part pay for No. 3 Schumacher upright piano in walnut, mahogany or ebony, at $500.00, balance $275.00, to be paid at $50.00 per quarter, from date of delivery of upright piano—8 per cent. per annum. S. W. Raudenbush."

Defendant answered that he was and ever had been ready and willing to deliver the new upright piano on receiving the $275. He alleged that he had learned that plaintiff was insolvent, and he claimed the right to retain the piano until paid the balance of the price. The trial court sustained this defense and directed judgment that plaintiff take nothing by this action. He moved for a new trial, and being denied appeals.

MITCHELL, J. Stated according to its legal effect, the contract, upon which this action was brought, was an executory one for the sale of a piano by defendant to plaintiff, a part of the price being paid at the date of the contract, and the balance to be paid in quarterly installments from and after the date of the delivery of the piano. The action is for damages for a refusal to supply the piano according to the contract. It is not alleged that the balance of the price has ever been paid or tendered, the plaintiff standing on the terms of the contract that it was to be furnished on credit. Much of the answer consists of entirely irrelevant matters, the only defense alleged being that since the making of the contract the plaintiff had become, and still is, insolvent, and the only important question in the case is whether the defendant has established a defense justifying his refusal to deliver the piano on that ground.

Where a vendor contracts to sell personal property on credit, he thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the vendee shall keep his credit good.

If, therefore, before payment, and while the vendor still retains possession of the property, he discovers that the vendee is insolvent, he may hold the goods as security for the price. The insolvency of the vendee does not rescind the contract, and is not of itself a ground for rescission. It merely entitles the vendor to demand payment in cash before parting with possession of the property. Courts have differed as to the name to be given to this right, but they all recognize its existence. Like the analogous right of stoppage in transitu, it grows out of the vendor's original ownership and dominion, and is founded on the equitable principle that one man's property ought not to go to pay another man's debt.

The right is not limited to cases where the insolvency of the vendee occurred after the date of the contract, but exists also even where the insolvency existed at that time, but was not discovered by the vendor until afterwards; and, as the presumption of both reason and law is that, where a vendor sold goods on credit, he believed that the purchaser was solvent and able to pay, the burden is on the vendee to prove that the vendor had knowledge of the insolvency at the time, and entered into the contract with that knowledge. The right is not affected by the fact that part of the price has been paid; and it makes no difference whether the sale was of a specific article appropriated to the contract, or, as in this case, a contract to supply an article of a certain description. The term "insolvent" is not used in any technical sense. It is not necessary that the vendee should have been adjudged a bankrupt or insolvent, or have made an assignment of his property. Insolvency, as applied to this branch of law, means a general inability to pay one's debts or to meet one's financial engagements.

Passing to the facts of this case, an examination of the evidence satisfies us that it amply justified the trial court in finding that the plaintiff was insolvent in the fullest sense of the term. It follows that defendant had a right to refuse to deliver the property without payment in full of the price, provided he properly asserted that right, and had not in some way waived it.

The contract was made in April, 1889. The evidence is practically undisputed that for some two years afterwards the defendant was not only able and ready to furnish the piano, but repeatedly urged the plaintiff to come and select an instrument, but that he failed to do so, giving as a reason his inability to meet the payments. Finally, in the winter or early spring of 1893, after defendant had ceased to represent that make of piano in the trade, and hence no longer kept it in stock, the plaintiff for the first time formally demanded the delivery of the instrument within a specified time. Failing in some efforts to induce plaintiff to accept a piano of another kind, the defendant required some assurance that, if he procured a piano of the kind called for by the contract, the plaintiff would be ready to pay for it in cash, or give a mortgage on the instrument to secure the purchase price. The plaintiff positively refused to agree to do either, and insisted on the terms of the original contract for the delivery of the property on credit, which defendant as positively refused to do.

The evidence would fully justify the conclusion that the defendant was always willing to furnish the piano if plaintiff would pay the price in cash, or secure it by mortgage on the property, and that his refusal merely went to the extent of refusing to furnish it on credit without security.

But at no time during the negotiations did defendant assign the insolvency of the plaintiff as his reason for demanding cash or security, or give any special reason for doing so, except that when demanding the mortgage he said it was the custom of the trade. On this ground plaintiff's counsel invoke the doctrine that if a person, when called upon to deliver, places his right to retain the goods upon a ground inconsistent with a claim by virtue of a specific lien, this is a waiver of the lien; and that on the trial he will not be permitted to rest his refusal on a different and distinct ground from that on which he claimed to retain the property at the time of the demand.

An examination of the authorities on the subject, from the early case of Boardman v. Sill, 1 Camp. 410, down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so.

But no such state of facts exists in this case. While defendant did not specify his vendor's lien by reason of plaintiff's insolvency as the ground of his refusal, yet he never placed his refusal on any ground inconsistent with or independent of it. On the contrary, from first to last, what he insisted on was payment of, or security for, the price of the property; and the ground of his refusal was the refusal of plaintiff to give either. True, at the last, he announced his positive refusal to furnish the piano unless plaintiff would agree to give a chattel mortgage on it,—a thing which he had no legal right to insist on; but it is very evident that this demand on defendant's part was merely an alternative for payment in cash, which he had a right to demand, but which plaintiff had refused.

The plaintiff probably had a right to be informed, as he was, that the property was held for the purchase money, for that was a matter which he could remedy by payment, but it would have availed him nothing to be informed that defendant's right to retain the property for the price was based on his insolvency, for that was a fact which he could not have changed. We can see nothing in defendant's acts of omission or commission that amounted to a waiver of his title, or which should estop him from now asserting it.

The rulings of the trial court on the admissibility of evidence as to plaintiff's insolvency were not always correct, or even consistent; but the only error of which plaintiff could complain is that, in one instance, the defendant was allowed to give his opinion that plaintiff was insolvent.

We think, however, that this was error without prejudice, for the reason that the other evidence, such as plaintiff's own admission of inability to pay; the inability of others, after search and inquiry, to find any property belonging to him; and that he was not in any business in this state, of which he had practically ceased to be a resident, —was such as, in the absence of any rebutting evidence, to require a finding that he was insolvent.

Order affirmed.[2]

## AMES v. MOIR et al.

(Supreme Court of Illinois, 1889. 130 Ill. 582, 22 N. E. 535.)

Craig, J.[3] This was an action of assumpsit brought by Robert Moir & Co. in the superior court of Cook county against Wilson Ames, to recover the price of 100 barrels of high wines sold by the plaintiffs to the defendant on the 9th day of June, 1870. The action was brought upon a contract in writing, which was as follows:

"Chicago, June 9, 1870.

"I have this day bought of Robert Moir & Co. one hundred (100) barrels high wines, 'iron bound,' at one dollar seven cents ($1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days' notice, and, if not called for by the 20th July, the seller has the privilege of delivering up to the end of July by giving three days' notice; to be delivered in fifty barrel lots. To insure the fulfillment of this contract, a margin of $300 will be put up by both parties.

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[2] In Douglas v. Shumway, 13 Gray (Mass.) 498 (1859), Bigelow, J., said: "The evidence offered in support of the defendant's claim to a lien as vendor of the wood was rightly rejected. The contract of sale contemplated that the vendee should expend labor and money in felling the trees and preparing the wood for market; and the case finds that the wood had been cut by the vendee, and a portion thereof sold by him and hauled off the land. We think these facts are inconsistent with an existing right of lien in the vendor for the purchase money. We know of no case where such a right has been recognized, after the vendee has, at his own expense, in pursuance of the contract of sale, changed the character of the property, and by his own labor and money added to its value. By these acts the vendor must be deemed to have parted with his possession and control of the property. The vendee, by himself and his agents, had taken it into his actual possession, and incorporated with it the labor bestowed by him in preparing it for sale. There was therefore such a change of possession from the vendor to the vendee as to defeat any right of lien in the vendor. Upon this ground, the case is clearly distinguishable from Arnold v. Delano, 4 Cush. 33 [50 Am. Dec. 754.]"

[3] Part of the opinion is omitted.

"Wilson Ames."

This instrument of writing, after it was executed by Ames on the day it bears date, was at once delivered to the agents of Moir & Co., and accepted by them. On the same day a margin of $300 was put up by each party as provided in the agreement. It also appears that on the 15th day of July, 1870, Ames notified the agents of Moir & Co. to deliver the high wines. Upon receipt of the notice the high wines were on July 18 delivered by Moir & Co., and accepted by Ames, but Ames has never paid for the goods. * * *

After the high wines had been delivered, late in the afternoon of July 18, Ames absented himself from his place of business, and could not be found by the agents of Moir & Co. to make a demand of payment for the high wines. They directed the porter in charge of Ames' warehouse to take care of the goods until morning, when they would call for the pay. When the agents called in the morning, Ames was nowhere to be found, and they found that he had shipped 50 barrels of the high wines for New York, and the remaining 50 barrels were loaded on cars ready for shipment. Phillips & Carmichael immediately replevied the 50 barrels which were found on cars in Chicago, and went on to Detroit, Mich., where they overhauled the other 50 barrels, and they were also replevied. Phillips & Carmichael sold the wines thus replevied to Shufeldt & Co. at 97 cents per gallon, the market price at that time, and deposited the proceeds in bank to await the result of the replevin suits. It appears that between the time the wines were delivered, late in the afternoon of July 18, and the time the agents reached Ames' store next morning, Ames had sent all the wines to the Michigan Central depot, shipped them, obtained bills of lading, which were attached to drafts on the consignee in New York,—one for $2,800, and the other for $2,900,—which drafts he discounted at the National Bank of Commerce on the security of the bills of lading. The replevin suits were defended by the National Bank of Commerce, and the defense interposed that the bank was the pledgee of the high wines from Ames in good faith, and without notice of Moir & Co.'s rights, was in the end sustained, (see Michigan Central Railroad Co. v. Phillips, 60 Ill. 190;) and the money realized on the sale of the high wines to Shufeldt & Co. was turned over to the National Bank of Commerce in payment of the drafts.

In view of the fact that the wines were thus replevied and sold by the agents of Moir & Co., it is insisted that Moir & Co. elected to rescind the contract under which the high wines were sold to Ames. and, having so elected, they cannot now maintain an action upon it.

It may be conceded that a contract for the sale of goods cannot be rescinded, and at the same time an action be maintained upon it for the contract price of the goods. But we do not understand that the contract in this case was rescinded, or that any effort whatever was made to rescind the contract. When the wines were delivered, Moir & Co. were entitled to payment. The delivery and payment were concurrent acts, and Moir & Co. were not bound to part with the absolute possession of the goods until they received the price named in the contract. In other words, they had a lien on the goods for the purchase money, which they were under no obligations to relinquish until payment was made. In Canadian Bank v. McCrea, 106 Ill. 298, this court held that when goods are placed by the vendor in the hands of the purchaser, in expectation that he will immediately pay the price, and he fails to do so, the vendor is at liberty to regard the delivery as conditional, and may at once reclaim the goods. But by holding the possession of the goods, or reclaiming them after the purchaser refuses to pay, the contract of sale is not thereby rescinded. The vendor merely retains possession to enforce his lien as vendor.

What are the rights of a vendor of goods where the vendee refuses to pay upon delivery or on offer to deliver goods? This question arose in Bagley v. Findlay, 82 Ill. 525, and this court held that the vendor had three remedies: (1) The vendor may store the goods for the vendee, give notice that he has done so, and then recover the full contract price. (2) He may keep the goods, and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery. (3) The vendor may sell the goods to the best advantage, and recover of the vendee the loss, if the goods failed to bring the contract price. The same rule is laid down in Benj. on Sales, (2d Ed.) § 788.

Here the possession of the goods was fraudulently obtained, with the view to ship them out of the state, and not pay the purchase money agreed to be paid. As against Ames, Moir & Co. had the right to replevy the goods, not for the purpose of rescinding the contract, but for the purpose of asserting the vendor's lien, and holding the possession of the goods until Ames should pay for the same. It turned out, however, that the action of replevin was unavailing, as the goods had by the act of Ames passed into the custody of innocent purchasers before they were reached by the writ of replevin, and the proceeds of the goods were used in payment of the advances of the National Bank of Commerce. Benj. on Sales, § 735, (2d Ed.) says: "The vendor's remedy after a resale, made in the absence of an express reservation of the right, is assumpsit on the original contract, which was not rescinded by the resale." This was the course pursued here, and we regard it correct.

We have been referred in the argument to Kellogg v. Turpie, 93 Ill. 265, 34 Am. Rep. 163, and Doane v. Lockwood, 115 Ill. 490, 4 N. E. 500, and also cases decided in the courts of other states, where it has been held that the rescission of a contract of sale, where there was fraud in the contract, was inconsistent with a subsequent action on the contract; that, if the contract was rescinded by the vendor on the ground of fraud in the contract, a subsequent action on the contract itself could not be maintained. We concur fully in the law as laid down in these cases, but they have no application to the facts of this case. As heretofore stated, the commencement of the action of replevin was not a rescission of the contract by Moir & Co., but it was a proceeding to enforce the vendor's lien. To place the wines in that position, the vendors had the right to hold them in until the vendee should pay for them. * * *

Judgment affirmed.

## SECTION 2.—STOPPAGE IN TRANSITU

### WISEMAN v. VANDEPUTT.

(High Court of Chancery, 1690. 2 Vern. 203.)

The plaintiffs being assignees under a statute of bankruptcy taken out against the Bonnells, brought their bill for a discovery and relief, touching two cases of silk at first consigned by Altoniti and Antinori to the Bonnells, then considerable merchants in London; but before the ship set sail from Leghorne, news came that the Bonnells were failed, and thereupon Altoniti and Antinori alter the consignment of the silks, and consign them to the defendant.

Upon the first hearing the court ordered all letters, papers, &c. to be produced, and that the parties proceed to a trial in Trover, to see whether the first consignment, notwithstanding the altering thereof, and new consignment made, before the ship sailed, vested the property of those silks in the Bonnells; and upon the trial, and verdict being given for the plaintiffs, the cause now came on upon the equity reserved.

The court declared the plaintiffs ought not to have had so much as a discovery, much less any relief in this court, in regard that the silks were the proper goods of the two Florentines, and not of the Bonnells, nor the produce of their effects; and therefore they having paid no money for the goods, if the Italians could by any means get their goods again into their hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity.

And it was so ruled in the like case between Wigfall and Motteux, &c. and lately between Hitchcock and Sedgwick in case of a purchase, without notice of bankruptcy. Therefore decreed an account, if any thing due from the Italians to the Bonnells, that should be paid the plaintiffs, but they should not have the value of the silks by virtue of the consignment or verdict, and put the Italians to come in as creditors under the Statutes of Bankrupts.

## BURGHALL v. HOWARD.

(At Guildhall after Hilary, 1759. 1 H. Bl. 366, note.)

One Burghall at London gave an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship there, whereof Howard the Defendant was master, who signed a bill of lading to deliver it in good condition to Burghall in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the Defendant was ordered on behalf of Bromley not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned, whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the Defendant as a carrier.

Lord Mansfield was of the opinion that the plaintiffs had no foundation to recover, and said he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee, or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property. See Lickbarrow v. Mason, 6 East, 27, note.

The plaintiffs were nonsuited.[4]

## LICKBARROW et al. v. MASON et al.

(House of Lords, 1793. 6 East, 20, note.)

Trover for a cargo of corn. Plea the general issue. The plaintiffs, at the trial before Buller, J., at the Guildhall Sittings after last Easter Term, gave in evidence that Turing & Son, merchants at Middlebourg in the province of Zealand, on the 22d July, 1786, shipped the goods in question on board the Endeavour for Liverpool by the order and directions and on the account of Freeman of Rotterdam. That Holmes, as master of the ship, signed four several bills of lading for the goods in the usual form unto order or to assign; two of which were indorsed by Turing & Son in blank, and sent on the 22d July, 1786, by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing & Son, and the remaining one was kept by Holmes. On the 25th July, 1786, Turing & Son drew four several bills of exchange upon Freeman, amounting in the whole to £477. in respect of the price of the goods, which were afterwards accepted by Freeman. On the 25th of July, 1786, Freeman sent to the plaintiffs the two bills of lading together with the invoice which he had received from Turing & Son in the same state in which he received them, in order that the goods might be taken possession of and sold by them on Freeman's account; and on the same day Freeman drew three sets of bills of exchange to the amount of £520. on the plaintiffs, who accepted them and have since duly paid them.

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[4] As as to the existence of the right of stoppage in transitu in the civil law, see Williston, Sales, § 519.

The plaintiffs are creditors of Freeman to the amount of £542. On the 15th August, 1786, and before the four bills of exchange drawn by Turing & Son on Freeman became due, Freeman became a bankrupt; those bills were regularly protested, and Turing & Son have since been obliged, as drawers, to take them up and pay them. The price of the goods so shipped by Turing & Son is wholly unpaid.

Turing & Son hearing of Freeman's bankruptcy on the 21st of August, 1786, indorsed the bill of lading so retained by them to the defendants, and transmitted it to them, with an invoice of the goods, authorizing them to obtain possession of the goods on account of and for the use and benefit of Turing & Son, which the defendants received on the 28th August, 1786. On the arrival of the vessel with the goods at Liverpool on the 28th August, 1786, the defendants applied to Holmes for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them for and on account of and to and for the use and benefit of Turing & Son. The defendants sold the goods on the account of Turing & Son, the proceeds whereof amounted to £557. Before the bringing of this action the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs or Freeman have paid or offered to pay the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.[5]

The Court of King's Bench gave judgment for the plaintiff, which was reversed in the Exchequer Chamber, and the judgment of the Exchequer Chamber was in turn reversed in the House of Lords, and a venire facias de novo directed to be awarded. The ground of the reversal in the House of Lords was that the demurrer to evidence appeared to be informal on the record MS. On the principal question Buller J., delivered an elaborate opinion.

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[5] This statement of facts is taken from the report of the case in the King's Bench, 2 Term. Rep. 63.

Buller, J.[6] * * * But the second question made in the cause is that, however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods in transitu, and have a lien for the original price of them. Before I consider the authorities applicable to this part of the case, I will beg leave to make a few observations on the right of stopping goods in transitu, and on the nature and principle of liens. 1st. Neither of them are founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights. They are qualified rights, which in given cases may be exercised over the property of another; and it is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods in transitu. If the goods be his, he has a right to the possession of them whether they be in transitu or not: he has a right to sell or dispose of them as he pleases, without the option of any other person: but he who has a lien only on goods has no right so to do; he can only retain them till the original price be paid: and therefore if goods are sold for £500. and by a change of the market, before they are delivered, they become next day worth £1000. the vendor can only retain them till the £500. be paid, unless the bargain be absolutely rescinded by the vendee's refusing to pay the £500. 2dly. Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone. 3dly. The right of stopping in transitu is founded wholly on equitable principles, which have been adopted in courts of law; and as far as they have been adopted, I agree they will bind at law as well as in equity. So late as the year 1690, this right, or privilege, or whatever it may be called, was unknown to the law.

The first of these positions is self evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a tailor, or an inn-keeper, deliver up the goods, his lien is gone. So also is the case of a factor as to the particular goods: but by the general usage in trade he may retain for the balance of his account all goods in his hands, without regard to the time when or on what account he received them. In Snee v. Prescott, Lord Hardwicke says, that which not only applies to the case of liens, but to the right of stopping goods in transitu under circumstances similar to the case in judgment; for he says, where goods have been negotiated, and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price; for then no dealer would know when he purchased goods safely. So in Lempriere v. Pasley, 2 Term Rep. 485, the Court said it would be a great inconvenience to commerce if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned till they actually arrived in port. There are other cases which in my judgment apply as strongly against the right of seizing in transitu to the extent contended for by the defendants; but before I go to them, with your Lordship's permission, I will state shortly the facts of the case of Snee v. Prescott, with a few more observations upon it.

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[6] Part of the opinion is omitted.

The doctrine of stopping in transitu owes its origin to courts of equity; and it is very material to observe that in that case, as well as many others which have followed it at law, the question is not as the counsel for the defendants would make it, whether the property vested under the bill of lading; for that was considered as being clear; but whether, on the insolvency of the consignee, who had not paid for the goods, the consignor could countermand the consignment, or in other words devest the property which was vested in the consignee. Snee and Baxter, assignees of John Tollet v. Prescott and Others, 1 Atk. 245. Tollet, a merchant in London, shipped to Ragueneau & Co., his factors at Leghorn, serges to sell, and to buy double the value in silks, for which the factors were to pay half in ready money of their own, which Tollet would repay by bills drawn on him. The silks were bought accordingly, and shipped on board Dawson's ship, marked T; Dawson signed three bills of lading, to deliver at London to factors, consignors, or their order. The factors indorsed one bill of lading in blank, and sent it to Tollet, who filled up the same and pawned it. The bills drawn by the factors on Tollet were not paid, but Tollet became a bankrupt. The factors sent another bill of lading, properly indorsed, to Prescott, who offered to pay the pawnee, but he refused to deliver up the bill of lading; on which Prescott got possession of the goods from Dawson, under the last bill of lading. The assignees of Tollet brought the bill to redeem by paying the pawnee out of the money arising by sale, and to have the rest of the produce paid to them; and that the factors, although in possession of the goods, should be considered as general creditors only, and be driven to come in under the commission. Decreed, 1st, that the factors should be paid; 2d, the pawnees; and 3d, the surplus to the assignees.

The decree was just and right in saying that the consignor, who never had been paid for the goods, and the pawnees, who had advanced money upon the goods should both be paid out of the goods before the consignee or his assignees should derive any benefit from them. That was the whole of the decree; and if the circumstance of the consignor's interest being first provided for be thought to have any weight, I answer, 1st, That such provision was founded on what is now admitted to be an apparent mistake of the law, in supposing that there was a difference between a full and a blank indorsement. Lord Hardwicke considered the legal property in that case to remain in the consignor, and therefore gave him the preference. 2dly, That whatever might be the law, the mere fact of the consignor's being in possession was a sufficient reason for a court of equity to say, we will not take the possession from you till you have been paid what is due to you for the goods. Lord Hardwicke expressly said, this Court will not say, as the factors have re-seized the goods, that they shall be taken out of their hands till payment of the half price which they have laid down upon them. He who seeks equity must do equity; and if he will not, he must not expect relief from a court of equity. It is in vain for a man to say in that court, I have the law with me, unless he will shew that he has equity with him also. If he mean to rely on the law of his case, he must go to a court of law; and so a court of equity will always tell him under those circumstances.

The case of Snee v. Prescott is miserably reported in the printed book: and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way: and perhaps, even he himself by being very diffuse has laid a foundation for doubts which otherwise would never have existed. I have quoted that case from a MS. note taken, as I collect, by Mr. John Cox, who was counsel in the cause; and it seems to me that on taking the whole of the case together, it is apparent that whatever might have been said on the law of the case in a most elaborate opinion, Lord Hardwicke decided on the equity alone arising out of all the particular circumstances of it, without meaning to settle the principles of law, on which the present case depends. In one part of his judgment he says, that in strictness of law the property vested in Tollet at the time of the purchase; but however that may be, says he, this Court will not compel the factors to deliver the goods without being disbursed what they have laid out. He begins by saying, the demand is as harsh as can possibly come into a court of equity. And in another part of his judgment he says, suppose the legal property in these goods was vested in the bankrupt, and that the assignees had recovered, yet this Court would not suffer them to take out execution for the whole value, but would oblige them to account.

But further, as to the right of seizing or stopping the goods in transitu, I hold that no man who has not equity on his side can have that right. I will say with confidence, that no case or authority till the present judgment can be produced to shew that he has. But on the other hand, in a very able judgment delivered by my brother Ashhurst in the case of Lempriere v. Pasley, in 1788, (2 Term Rep. 485,) he laid it down as a clear principle that as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. This is founded on plain and obvious reason; for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him has equity in his favour: and if he have law and equity both with him, he cannot be beat by a man who has equal equity only. Again, in a very solemn opinion delivered in this house by the learned and respectable Judge (Eyre, then Lord C. B.) who has often had the honour of delivering the sentiments of the Judges to your Lordships when you are pleased to require it, so lately as the 14th May, 1790, in the case of Kinloch v. Craig, 3 Term R. 787, it was laid down that the right of stopping goods in transitu never occurred but as between vendor and vendee; for that he relied on the case of Wright v. Campbell, 4 Burr. 2050.

Nothing remains in order to make that case a direct and conclusive authority for the present, but to shew that this is not the case of vendor and vendee. The terms vendor and vendee necessarily mean the two parties to a particular contract: those who deal together, and between whom there is a privity in the disposition of the thing about which we are talking. If A. sells a horse to B., and B. afterwards sell him to C., and C. to D. and so on through the alphabet, each man who buys the horse is at the time of buying him a vendee; but it would be strange to speak of A. and D. together as vendor and vendee; for A. never sold to D., nor did D. ever buy of A. These terms are correlatives, and never have been applied, or ever can be applied in any other sense than to the persons who bought, and sold to, each other. The defendants, or Turing, in whose behalf, and under whose name and authority they have acted, never sold these goods to the plaintiffs; the plaintiffs never were the vendees of either of them. Neither do the plaintiffs, (if I may be permitted to repeat again the forcible words of the noble Judge who pronounced the judgment in question,) represent Freeman, so as to be answerable for his engagements, or stand affected by any notice of those circumstances which would bar the claim of Freeman or his assignees. These reasons, which I could not have expressed with equal clearness, without recurring to the words of the two great authorities by whom they were used, and to whom I always bow with reverence. in my humble judgment put an end to all questions about the right of seizing in transitu.

Two other cases were mentioned at the bar which deserve some attention. One is the case of the assignees of Burghall v. Howard, 1 H. Blac. 365, note, before Lord Mansfield at Guildhall in 1759, where the only point decided by Lord Mansfield was, that if a consignee become a bankrupt, and no part of the price of the goods be paid, the consignor may seize the goods before they come to the hands of the consignee or his assignees. This was most clearly right; but it does not apply to the present case: for when he made use of the word "assignees," he undoubtedly meant assignees under a commission of bankrupt, like those who were then before him, and not persons to whom the consignees sold the goods. For in that case it is stated that no part of the price of the goods was paid. The whole cause turns upon this point. In that case no part of the price of the goods was paid, and therefore the original owner might seize the goods. But in this case the plaintiffs had paid the price of the goods, or were under acceptances for them, which is the same thing; and therefore the original owner could not seize them again. But the note of that case says, Lord Mansfield added, "and this was ruled not upon principles of equity only, but the laws of property." Do these words fairly import that the property was not altered by a bill of lading, or by the indorsement of it? That the liberty of stopping goods in transitu is originally founded on principles of equity, and that it has, in the case before him, been adopted by the law, and that it does affect property, are all true; and that is all that the words mean; not that the property did not pass by the bill of lading. The commercial law of this country was never better understood, or more correctly administered than by that great man. It was under his fostering hand that the trade and the commercial law of this country grew to its present amazing size: and when we find him in other instances adopting the language and opinion of Lord C. J. Holt, and saying, that since the cases before him it had always been held, that the delivery of a bill of lading transferred the property at law; and in the year 1767 deciding that very point; it does seem to me to be absolutely impossible to make a doubt of what was his opinion and meaning. All his determinations on the subject are uniform.

Even the case of Savignac v. Cuff, of which we have no account, besides the loose and inaccurate note produced at the bar (cited in 2 Term Rep. 66), as I understand it, goes upon the same principle. The note states that the counsel for the plaintiff relied on the property passing by the bill of lading; to which Lord Mansfield answered, the plaintiff has lost his lien, he standing in the place of the consignee. Lord Mansfield did not answer mercantile questions so: which, as stated, was no answer to the question made. But I think enough appears on that case to shew the grounds of the decision, to make it consistent with the case of Wright and Campbell, and to prove it a material authority for the plaintiffs in this case. I collect from it that the plaintiff had notice by the letter of advice that Lingham had not paid for the goods; and if so, then according to the case of Wright v. Campbell, he could only stand in Lingham's place. But the necessity of recurring to the question of notice strongly proves that if there had been no such notice, the plaintiff, who was the assignee of Lingham the consignee, would not have stood in Lingham's place, and the consignor could not have seized the goods in transitu: but that, having seized them, the plaintiff would have been entitled to recover the full value of them from him. This way of considering it makes that case a direct authority in point for the plaintiffs.

There is another circumstance in that case material for consideration, because it shews how far only the right of seizing in transitu extends as between the consignor and consignee. The plaintiff in that action was considered as the consignee; the defendant, the consignor, had not received the full value for his goods, but the consignee had paid £150. on account of them. Upon the insolvency of the consignee the consignor seized the goods in transitu, but that was holden not to be justifiable, and therefore there was a verdict against him. That was an action of trover, which could not have been sustained but on the ground that the property was vested in the consignee, and could not be seized in transitu as against him. If the legal property had remained in the consignor, what objection could be stated in a court of law to the consignor's taking his own goods? But it was holden that he could not seize the goods; which could only be on the ground contended for by Mr. Wallace, the counsel for the plaintiff, that the property was in the consignee. But though the property were in the consignee, yet, as I stated to your Lordships in the outset, if the consignor had paid to the consignee all that he had advanced on account of the goods, the consignor would have had a right to the possession of the goods, even though they had got into the hands of the consignee; and upon paying or tendering that money and demanding the goods the property would have revested in him, and he might have maintained trover for them. But admitting that the consignee had the legal property, and was therefore entitled to a verdict, still the question remained what damages he should recover. And in ascertaining them regard was had to the true merits of the case, and the relative situation of each party. If the consignee had obtained the actual possession of the goods he would have had no other equitable claim on them than for £150. He was entitled to no more; the defendant was liable to pay no more; and therefore the verdict was given for that sum.

This case proceeded precisely upon the same principles as the case of Wiseman v. Vandeput; where, though it was determined that the legal property in the goods, before they arrived, was in the consignee, yet the Court of Chancery held that the consignee should not avail himself of that beyond what was due to him. But for what was due, the Court directed an account; and if any thing were due from the Italians to the Bonnells, that should be paid the plaintiffs. The plaintiffs in this cause are exactly in the situation of the plaintiffs in that case; for they have the legal property in the goods; and therefore if any thing be due to them, even in equity, that must be paid before any person can take the goods from them; and £520. was due to them, and has not been paid.

After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped in transitu after they have been sold and paid for, or money advanced upon them bona fide, and without notice, I do not conceive that the case is open to any arguments of policy or convenience. But if it should be thought so, I beg leave to say, that in all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negociation of property as quick, as easy, and as certain as possible. If this judgment stand, no man will be safe either in buying, or in lending money upon goods at sea. That species of property will be locked up; and many a man, who could support himself with honour and credit if he could dispose of such property to supply a present occasion, would receive a check, which industry, caution, or attention could not surmount. If the goods are in all cases to be liable to the original owner for the price, what is there to be bought?

There is nothing but the chance of the market, and that the buyer expects as his profit on purchasing the goods, without paying an extra price for it. But Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, lien, or a right to seize in transitu. The great advantage which this country possesses over most if not all other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports. But amidst all these indulgencies the wise merchant is not unmindful of his true interests and the security of his capital.

I will beg leave to state, in as few words as possible, what is a very frequent occurrence in the city of London. A cargo of goods of the value of £2000. is consigned to a merchant in London; and the moment they are shipped the merchant abroad draws upon his correspondent here to the value of that cargo: and by the first post or ship he sends him advice, and incloses the bill of lading. The bills, in most cases, arrive before the cargo; and then the merchant in London must resolve what part he will take. If he accept the bills he becomes absolutely and unconditionally liable; if he refuse them he disgraces his correspondent, and loses his custom directly. Yet to engage for £2000. without any security from the drawer is a bold measure. The goods may be lost at sea; and then the merchant here is left to recover his money against the drawer as and when he may. The question then with the merchant is, how can I secure myself at all events? The answer is, I will insure, and then if the goods come safe I shall be repaid out of them, or if they be lost, I shall be repaid by the underwriters on the policy. But this cannot be done unless the property vest in him by the bill of lading: for otherwise his policy will be void for want of interest. And an insurance in the name of the foreign merchant would not answer the purpose. This is the case of the merchant who is wealthy, and has the £2000. in his banker's hands, which he can part with, and not find any inconvenience in so doing.

But there is another case to be considered, viz. Suppose the merchant here has not got the £2000. and cannot raise it before he has sold the goods? the same consideraions arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due. Then the question is, how can that be done? If he have the property in the goods, he can go to market with the bill of lading and the policy, as was done in Snee and Prescott; and upon that idea he has hitherto had no difficulty in doing so. But if he have not the property nobody will buy of him, and then his trade is undone.

But there is still a third case to be considered; for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea. I will put the case by way of example, that barilla is shipped for a merchant here at a time when there has been a dearth of that commodity, and it produces a profit of 25*l.* per cent., whereas upon an average it does not produce above 12*l.* The merchant has advices that there is a great quantity of that article in Spain intended for the British market, and when that arrives the market will be glutted, and the commodity much reduced in value. He wishes therefore to sell it immediately whilst it is at sea, and before it arrives, and the profit which he gets by that is fair and honourable; but he cannot do it if he have not the property by the bill of lading. Besides, a quick circulation, is the life and soul of trade; and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded. From the little experience which I acquired on this subject at Guildhall, I am confident that if the goods in question be retained from the plaintiff without repaying him what he has advanced on the credit of them, it will be mischievous to the trade and commerce of this country; and it seems to me that not only commercial interest, but plain justice and public policy forbid it.

To sum up the whole in very few words, the legal property was in the plaintiff: the right of seizing in transitu is founded on equity: no case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them; but Lord Hardwicke's opinion was clearly against it: and the law, where it adopts the reasoning and principle of a court of equity, never has and never ought to exceed the bounds of equity itself. I offer to your Lordships as my humble opinion, that the evidence given by the plaintiff, and confessed by the demurrer, is sufficient in law to maintain the action.

A venire facias de novo having been accordingly awarded by the King's Bench a special verdict was found upon the second trial, containing in substance the same facts as before, with this addition, that the jury found, that by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are, after the shipment, and before the voyage performed, negotiable and transferrable by the shipper's indorsement and delivery, or transmitting of the same to any other person; and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person. And that by the custom of merchants, indorsements of bills of lading in blank may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of the goods to be made to such person; and according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been done by the shipper. On this special verdict, the Court of King's Bench, understanding that the case was to be carried up to the House of Lords, declined entering into a discussion of it, merely saying, that they still retained the opinion delivered upon the former case, and gave judgment for the plaintiffs.

## NEWHALL et al. v. CENTRAL PAC. R. CO.

(Supreme Court of California, 1876. 51 Cal. 345, 21 Am. Rep. 713.)

CROCKETT, J.[7] This case comes up on the findings, and there is, therefore, no controversy as to the facts; the only question being, whether the plaintiffs are entitled to judgment on the facts found. The facts necessary to a correct understanding of the only question of law in the case are, that a mercantile firm in New York sold certain merchandise on credit to a similar firm in San Francisco, and shipped the same in the usual course of business, by railway, to the vendees as consignees, under bills of lading in the usual form. The bills of lading were received at San Francisco by the consignees before the goods arrived; and while the merchandise was in transit, in the custody of the defendant as a common carrier, the consignees failed, and became insolvent, and thereupon the vendors notified the defendant in writing that they stopped the goods in transitu; that the vendees had become insolvent, and the goods were not paid for, and that they must not be delivered to the consignees, but to the vendors. The plaintiffs then were, and for many years had been, auctioneers and commission merchants, doing business in San Francisco, and had been in the habit of receiving from the consignees bills of lading, and goods under them, for sale on commission. About two hours after the notice of stoppage in transitu was served upon the defendant, the consignees indorsed and delivered the bills of lading to the plaintiffs, who, on the faith thereof and of the goods named therein, "advanced a sum of money to the consignees in the usual course of business;" and the sum so advanced was to be reimbursed out of the proceeds of the goods, which were to be sold at auction by the plaintiffs. At the time of the indorsement and transfer of the bills of lading to the plaintiffs, they had no notice that the consignees were in failing circumstances, or had failed, or that any notice of stoppage in transitu had been served upon the defendant. While the goods were still in the possession of the defendant as a common carrier, the plaintiffs, as holders, exhibited to the defendant the bills of lading, tendered the charges, and demanded a delivery of the goods, which was refused, and the action is to recover their value.

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[7] The statement of facts is omitted.

The question involved being one of great practical importance, it has been discussed by counsel both orally and in printed arguments, with learning and ability. But after the most careful research, they have failed to call to our attention a single adjudicated case in which the precise question under review has been decided or discussed. There are numerous decisions, both in England and America, to the effect that where goods are consigned by the vendor to the vendee, under bills of lading in the usual form, as in this case, an attempt by the vendor to stop the goods in transitu will be unavailing as against an assignee of the bill of lading, who took it in good faith, for a valuable consideration, in the usual course of business, before the attempted stoppage. The leading case on this point is Lickbarrow v. Mason (2 Term R. 63), the authority of which has been almost universally acquiesced in by the courts and text-writers, in this country and in England. There being little or no conflict in the authorities on the point adjudicated in that case, it would be useless to recapitulate them here. But it is important to ascertain the principles which underlie these decisions, that we may determine to what extent, if at all, they are applicable to the case at bar. The first, and, as I think, the controlling, point determined in these cases, is, that by the bill of lading the legal title to the goods passes to the vendee, subject only to the lien of the vendor for the unpaid price; which lien continues only so long as the goods are in transit, and can be enforced only on condition that the vendee is or becomes insolvent while the goods are in transit.

On the failure of each of these conditions, the right of stoppage is gone, and the lien ceases, even as against the vendee. But it is further settled by these adjudications, that if the bill of lading is assigned, and the legal title passes to a bona fide purchaser for a valuable consideration before the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well-known principle that a secret trust will not be enforced as against a bona fide holder for value of the legal title. In such a case, if the equities of the vendor and assignee be considered equal (and this is certainly the light most favorable to the vendor in which the transaction can be regarded), the rule applies that where the equities are equal the legal title will prevail. But in such a case it would be difficult to maintain that the equities are equal. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods; and a person dealing with him in the usual course of business, who takes an assignment for a valuable consideration, "without notice of such circumstances as render the bill of lading not fairly and honestly assignable," has a superior equity to that of the vendor asserting a recent lien, known, perhaps, only to himself and the vendee. Brewster v. Sime, 42 Cal. 139.

These being the conditions which determine and control the relative rights of the vendor and assignee, where the assignment is made before the notice of stoppage is given, precisely the same principles, in my opinion, are applicable when the assignment is made after the carrier is notified by the vendor. Notwithstanding the notice to the carrier, the vendor's lien continues to be only a secret trust as to a person, who, in the language of Mr. Benjamin, in his work on Sales, section eight hundred and sixty-six, takes an assignment of a bill of lading "without notice of such circumstance as renders the bill of lading not fairly and honestly assignable." The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and the carrier; and in dealing with the vendee, whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money on the faith of this apparently good title, is not bound, at his peril, to ascertain whether, possibly, the vendor may not have notified a carrier—it may be on some remote portion of the route—that the goods are stopped in transitu. If a person, taking an assignment of a bill of lading, is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor, and of every carrier through whose hands the goods are to come, whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class of commercial transactions will be practically abrogated.

In my opinion the judgment should be affirmed, and it is so ordered.

Mr. Chief Justice Wallace did not express an opinion.

## KEMP v. FALK.

(House of Lords, 1882. 7 App. Cas. 573.)

In March, 1878, Kiell bought on credit from Falk a cargo of salt, chartered the Carpathian and consigned the salt (which had been put on board by Falk) to Wiseman, Mitchell & Co. of Calcutta. Through T. Wiseman & Co. of Glasgow, the agents of Wiseman, Mitchell & Co., Kiell obtained an advance from the Bank of Scotland upon the security of the bills of lading which Kiell indorsed. In July Wiseman, Mitchell & Co. sold the cargo "to arrive." On the 20th of July Kiell went into liquidation and Falk on the 27th served on the shipowners in Liverpool notice to stop in transitu. The ship arrived at Calcutta on the 29th of July; part of the cargo was delivered to subpurchasers on the 3d of August, and the remainder, after notice to stop in transitu had been served on the captain, on the 5th of August. Wiseman, Mitchell & Co. remitted the proceeds of the subsales to the Bank of

Scotland, who deducted the amount of their advance and paid the balance to the appellant, Kiell's trustee in bankruptcy. Falk having applied to the Court of Bankruptcy to order the trustee to pay over the balance, which was less than the amount for which Falk sold to Kiell, the Registrar sitting as Chief Judge refused the application. On appeal the Court of Appeal (James, Baggallay, and Bramwell, L. JJ.) granted it.

Lord Blackburn. My Lords, I perfectly agree in the result that this appeal must be dismissed with costs. Originally in this case there was a statement of facts made in the Court of Bankruptcy, upon which there was an appeal to the Appeal Court; and on that statement of facts the ingenuity of counsel seems to have led the Court below to draw some inferences, which induced them, whilst giving judgment, as they have done, in favour of Mr. Falk, the present respondent, to intimate at the same time that they thought the case raised a question which had been raised in the case of Ex parte Golding, Davis & Co., 13 Ch. D. 628, and that therefore they should give leave to appeal. When the case came here the first time, my noble and learned friend Lord Penzance thought that the statement of facts was not intelligible, and that it was desirable that it should be sent down to have the facts made clear; and now it appears that the original statement of facts was not only not intelligible but also not quite accurate; and we have now an amended and supplementary statement of facts, shewing what the facts of the case really were. Taking that statement it seems to me that the case is perfectly clear. We have no occasion to consider whether the case of Ex parte Golding, Davis & Co., 13 Ch. D. 628, was well or ill decided, because no point relating to it arises here.

It appears that Mr. Falk of Liverpool had sold to Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Mr. Kiell accepted a draft drawn against that cargo; that bills of lading were made out, which were signed not as is usual by the master but by the shipowner himself, and that Mr. Kiell got those bills of lading. Now so far as that goes, standing there, nothing can be more thoroughly established than the law upon it. Mr. Falk having delivered the goods and taken a bill of exchange had no right whatever to meddle with those goods further, unless before the end of the transitus (I shall say a word presently as to what comes at the end of the transitus), Kiell the purchaser became insolvent and stopped payment, and then if Falk had stopped the goods in transitu he would have been revested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the transitus came, his right to stop the goods in transitu might be defeated by an indorsement upon the bill of lading to a person who gave value.

In the present case there was such an indorsement and transfer of the bill of lading, but it was only an indorsement and transfer for a particular and limited purpose. It appears that Mr. Kiell in order to obtain an advance got Messrs. T. Wiseman & Co. of Glasgow, the correspondents and agents of Messrs. Wiseman, Mitchell, Reid & Co. of Calcutta, to make an advance in his favour by drawing a bill of exchange upon him; and to secure the payment of that bill of exchange the bill of lading was indorsed, and the Bank of Scotland who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of the stoppage in transitu at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee, or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop in transitu everything which was not covered by that pledge. That was settled and has been considered law, or rather equity, ever since the case of In re Westzinthus, 5 B. & Ad. 817, and has been affirmed in Spalding v. Ruding, 6 Beav. 376, 12 L. J. (Ch.) 503; and I have no doubt it is very good law upon that point.

Here therefore the stoppage by Falk as unpaid vendor would revest in him his lien except so far as concerned the Bank of Scotland, unless something else had happened. Now what has happened? The argument of Mr. Bompas was this: First of all it appears that Messrs. Wiseman, Mitchell, Reid & Co., who were the persons to whom the goods were consigned (I do not understand whether they were purchasers, or merely agents for Kiell & Co.) sent over to their correspondents T. Wiseman & Co. of Glasgow a sale note, and then they forwarded it to Kiell & Co. in this letter: "Dear Sirs—We enclose sale note of your cargo of salt ex Carpathian to arrive" and so on—the rest of the letter does not matter. So that at that time it appears that Messrs. Wiseman, Mitchell & Co. had entered into a contract at Calcutta for a sale of the goods "to arrive." The date of that letter was the 17th of July, a fortnight or so before the ship actually did arrive at Calcutta. That, it was argued, put an end to the vendor's right to stop the goods in transitu, and pro tanto the equitable right to stop them in transitu which remained in Mr. Falk. I have endeavoured to understand on what ground it is supposed to put an end to it. No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage in transitu unless there were an indorsement of the bill of lading. Why any agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be supposed to put an end to the equitable right to stop them in transitu I cannot understand. I am quite clear that it does not.

The next thing which was attempted to be argued was this. The Bank of Scotland, the holders of the bill of lading at Glasgow, forwarded the bill of lading in due course to their agents at Calcutta;

and it is surmised that their agents at Calcutta must have been some persons different from Messrs. Wiseman, Mitchell & Co. I infer that Messrs. Wiseman, Mitchell & Co. were the people who acted as their agents in this transaction, but I do not think it matters whether they were or not. The Bank of Scotland sent the bill of lading to their agents, whether they were Messrs. Wiseman, Mitchell & Co. or any one else. Those agents received that bill of lading well knowing (or at all events they ought to have known) that the Bank of Scotland had by virtue of this bill of lading a hold over the goods. They were entitled to see that the goods were not sold or disposed of in any way prejudicial to their lien, and, if they were sold, that the money, or enough of it to repay the Bank of Scotland and secure them, should pass through their hands or the hands of their agents; and I see nothing that happened afterwards which shews that they acted otherwise than in strict conformity with the duty thus cast upon them. It was argued that inasmuch as Messrs. Wiseman, Mitchell & Co. had acted for Kiell & Co. in selling the goods, taking a del credere commission to secure that the people to whom they sold should pay the price, therefore they were persons who were entitled to have the bill of lading endorsed to them as a security. I am utterly unable to understand that argument, it is clear to me that they were not so entitled.

The next thing which was said was this. There was a little confusion in the statement here, but it is now said upon the amended statement of facts, that Messrs. Wiseman, Mitchell & Co., who I cannot but think were the persons employed by the Bank of Scotland as their agents, did at some time (I do not exactly know when) indorse the bill of lading and shew it to the captain. I do not think that that comes to more than this, that they gave the captain complete notice, when he arrived at Calcutta, "We are the persons who have the legal right to the delivery of these goods, for we have the bill of lading, holding it under the Bank of Scotland, and consequently we are the persons entitled to the goods. You can deliver only to us without being responsible to us; if you deliver to us or with our sanction you will not be responsible to us." I can put no other meaning upon it.

Then it was argued that this amounts to a delivery of the whole cargo by the shipowner to Messrs. Wiseman, Mitchell & Co., who from that time forward would be holders of the goods; the shipowner in whose physical possession, in the hold of whose vessel, the goods lay, being changed from holding the goods as shipowner, not having delivered the goods, into a warehouseman who was very inconveniently holding those goods in his ship as a warehouse. I think that that is an arrangement which might be made although it is not a very convenient one. The freight was not paid; but I think it is possible to make an arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman instead of being a carrier or a shipowner; he alters his responsibilities altogether; and yet by arrangement or agreement retains a lien over the goods until the freight is paid. I think such a contract might be made. But when one is asked to say that such a contract was made, the non-payment of the freight is a very important element leading one to say that no such contract was made at all. In this case I cannot help thinking that no such contract was made, and there is no reason why we should hold that it was. The shipowner acted in the same way as if it had not been made and in no other way.

Then comes an argument which I really think is not tenable, and I should hardly mention it if it were not for the great importance of everything relating to the Factors Act and of every question touching it in the commercial world. It was argued that the recent statute 40 & 41 Vict. c. 39, § 5, which says that the transfer of a delivery order or any other document of title shall put an end to an unpaid vendor's right to countermand that delivery order and to keep the goods, operates just to the same extent and under the same circumstances as in the case of a bill of lading for goods at sea. In order to make out that proposition reliance was placed upon this fact, that Messrs. Wiseman, Mitchell & Co., who were holders of the bill of lading, as I have already said, for the Bank of Scotland, wrote to the captain of the ship saying, "In order to save trouble we will not sign delivery orders for salt, but have written our sircar on board the above vessel to deliver salt to those men who produce cash receipts from our cashiers;" and by some strange process of reasoning it was said that the man who brought and shewed to the sircar of Messrs. Wiseman, Mitchell & Co. a receipt for a sum of money paid to their cashier for the salt, was the holder of a document of title for the salt in such a way that the indorsement of it could put an end to the right of stoppage in transitu by Mr. Falk. Now in the first place the statute in question was never meant to have that effect. In the next place it is an abuse of the language to call such a receipt as this a document of title in any shape.

Then the last and desperate attempt was to say that the stoppage in transitu was not until the 5th of August. I see that Lord Bramwell takes a different view of the law from what I had always understood it to be. Ex parte Falk, 14 Ch. D. 455. I had always myself understood that the law was that when you became aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a very good way, of stopping them in transitu was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be, and he might send it on; and I have always been under the belief that although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage in transitu; I have always thought that when the shipowner, having received such a notice, used reasonable diligence and sent the notice on, and it arrived before the goods were delivered, that was a perfect stoppage in transitu. Consequently I think that when notice was given to the shipowners (and although they had signed the bill of lading instead of the master signing it, I do not think that that makes any difference; I only mention it to say that it makes none) they were under an obligation to forward it with reasonable diligence, if they could, to the master.

What the shipowners did was this: On the 31st of July they sent a telegram (they waited two days, and they might have got into a scrape by that means), but they did send this telegram "Charterers Carpathian failed, unless bill of lading held for value, don't deliver." That was, as it strikes me, a sending forward of the notice to stop the goods in transitu: it was tantamount to saying, "We send to our captain the notice we have formally received ourselves;" and consequently I should say that the stoppage in transitu was complete on the 31st of July. But it is not necessary to decide that point, for it is clear enough that the goods were not then delivered, and nothing was done which could be called a delivery of the whole or any part of them until the 3d of August, when a person brings one of these receipts for, I think 1000 maunds of salt, or some small quantity of salt, and gets it delivered.

Then it is said that the delivery of a part is a delivery of the whole. It may be a delivery of the whole. In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence, that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole. I had always understood the law upon that point to have been an agreed law, which nobody ever doubted since an elaborate judgment in Dixon v. Yates, 5 B. & Ad. 313, 339, by Lord Wensleydale, who was then Parke, J. The rule I had always understood, from that time down to the present, to be that the delivery of a part may be a delivery of the whole if it is so intended, but that it is not such a delivery unless it is so intended, and I rather think that the onus is upon those who say that it was so intended. Therefore the delivery of this particular parcel of salt was not a delivery of anything else.

What we are now dealing with is the delivery of the salt which was delivered after the 5th of August, and which was quite sufficient to dispose of the whole sum now in dispute. We do not need to inquire what were the rights in any particular parcel of salt delivered on the 3d of August. Supposing that those were misdeliveries no harm would happen, as quite enough remained to pay the Bank of Scotland and no dispute would arise about that; there is no complaint by anybody respecting it. The present question is with regard to the stoppage in transitu of the residue after an undoubted notice of stoppage in transitu was served upon the 5th of August. Is that subject to the rule that although the whole of the cargo could not be stopped because the bill of lading had been transferred to the Bank of Scotland, the interest which still remained in Kiell or in Kiell's assigns to whom he had sold it, or in anybody else except those who had become transferees of the bill of lading, might be stopped and might become vested in Falk the original vendor?

I think there is no reason why it should not; and that being so, the judgment of the Court below is right and ought to be affirmed.[8]

## BLACKMAN et al. v. PIERCE.

(Supreme Court of California, 1863. 23 Cal. 508.)

After the sale of the goods by Blackman & Co., at San Francisco, to McDaniel, Blackman & Co. shipped the same to McDaniel, the vendee at Trinity Center. The bills of lading were made out in the name of the vendee. The goods, in ordinary course of transportation, arrived at the head of steamboat navigation, at Red Bluff, where they were placed in the hands of Pierce, Church & Co., warehousemen, who had orders from the vendee to forward them to him. Defendants, Pierce, Church & Co., defended on the ground of right of property, in the vendee, McDaniel. The Sheriff Johns, justified under the attachment issued in Fuller v. McDaniel. The other facts are stated in the opinion of the Court.

CROCKER, J., delivered the opinion of the Court—NORTON, J., concurring.

This is an action brought against Pierce, Church & Co., warehousemen at Red Bluff, and Johns, the Sheriff of Tehama County, to recover the value of a lot of goods sold by the plaintiffs, merchants in San Francisco, to one McDaniel, of Trinity Center, Trinity County; and which they claim by the right of stoppage in transitu, the purchaser having become insolvent after the sale of the goods. It appears that the goods were duly marked to McDaniel, care of Pierce, Church & Co., Red Bluff; that the plaintiffs shipped them on a steamer at San Francisco, and they duly arrived at Red Bluff, the point of transshipment from the river steamer to wagons, to be transported to their final destination; that Pierce, Church & Co. put them in their warehouse, advised McDaniel of their arrival, and he wrote them that he would send a team after them; that while they were thus in the warehouse at Red Bluff an attachment was levied upon them by the Sheriff, issued in an action brought by one Fuller against McDaniel; that after the purchase of the goods McDaniel became insolvent, and the price remained unpaid; that after the levy the plaintiffs, by their agent, gave notice to the warehousemen and the Sheriff that McDaniel had become insolvent; that the goods had been sold to him by them; that the price was unpaid, and that they claimed the right of stoppage in transitu, and demanded the goods of them, and they refused to deliver them.

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[8] Concurring opinions were delivered by Lords SELBORNE, WATSON, and FITZGERALD.

The right of a vendor who has sold goods on credit, when the vendee is insolvent, to stop and take them into his possession, at any time before their arrival at the place of destination, and going into the actual or constructive possession of the purchaser, is well established. Depositing them at an intermediate point, with an agent of the purchaser for the purpose of being forwarded, does not terminate the transitus. Markwald v. His Creditors, 7 Cal. 213. It is clear, therefore, that the mere fact that the goods had come into the possession of Pierce, Church & Co., to be forwarded to the purchaser, did not terminate the transitus or divest the plaintiffs of their right of stoppage in transitu.

This right of stoppage in transitu is paramount to any lien on the goods claimed by third persons against the purchaser. Thus it may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee; for the lien acquired by the levy operates only upon the interest of the debtor, but cannot defeat the paramount right of a stranger. Hilliard on Sales, 217. The Court found that the warehousemen stated to plaintiffs' agent, at the time of the demand, that they had no charges upon the goods. This was stated in reply to a question of the agent, who told them he was ready to pay their charges if any they had. By this, the warehousemen waived their lien for charges, if they had any. Everett v. Saltus, 15 Wend. (N. Y.) 474; Everett v. Coffin, 6 Wend. (N. Y.) 608, 22 Am. Dec. 551; Saltus v. Everett, 20 Wend. (N. Y.) 268, 32 Am. Dec. 541.

The judgment is affirmed.

## BERNDTSON v. STRANG.

(In Chancery, 1867. L. R. Eq. 481.)

This was a suit for the purpose of establishing the right of the Plaintiff, by virtue of the exercise of his right of stoppage in transitu, to a charge in equity upon the proceeds of certain timber sold by him to a firm in London, of whom the Defendants were the assignees under a deed for the benefit of creditors.

The facts, which were not in dispute, were thus stated upon the bill:

The Plaintiff, who is a timber merchant of Gefle, in Sweden, through his Paris agent, Charles Von Kock, entered into a contract in February, 1863, for the sale to Messrs. Langton & Robinson, a London firm, of a quantity of timber. The contract, which was reduced into writing, and signed by Messrs. Langton & Robinson, after stating the quantities of timber and the prices, proceeded thus:

"And the said prices, franco on bord, payable by buyer's acceptance of seller's drafts at six months from date of bills of lading. Shipment to London. Sellers to provide ships to a freight not exceeding 53s. in full, per Petersburger standard, with two or three guineas of gratification per 100 Petersb. stand. in case of need. If ships cannot be chartered within this limit the contract to be void."

It was subsequently agreed that, instead of Berndtson providing a ship for conveyance of the timber, Langton & Robinson should themselves charter a vessel to convey the timber from Gefle to London.

Messrs. Langton & Robinson accordingly chartered a ship, the Maastrom, which proceeded to Gefle, and on the 22nd of October, 1863, Berndtson shipped the timber on board of her. The price of the timber amounted to £1589. 12s. 6d., and an advance of £153. 8s. 2d. was made by Berndtson to the captain of the ship on account of the freight. These sums, together with three months' interest at 5 per cent. on the advance, amounted to £1744. 19s., and accordingly, in pursuance of the contract, Berndtson, on the 22nd of October, 1863, drew a bill of exchange of that date for this amount upon Langton & Robinson, payable six months after date. At the same time, in order, as the bill alleged, to preserve his control over such timber, Berndtson caused the bill of lading to be drawn in his name as shipper of the timber, and the same was thereby made deliverable to the order or assigns of Berndtson. [The bill of lading is here set out verbatim.]

Berndtson indorsed this bill of lading in blank, and caused it to be handed over to Langton & Robinson, in exchange for their acceptance of the bill of exchange for £1744. 19s. On receipt of the bill of lading Messrs. Langton & Robinson deposited it, together with a policy of insurance of the cargo of timber and other securities, with Messrs. Churchill & Sim, as a security for repayment of moneys due to them from Langton & Robinson.

The Maastrom, with the timber on board, sailed for London, but met with disasters on her voyage, got stranded, and on the 16th of November, 1863, was forced in distress to put into the port of Copenhagen, where she remained for some months. On the 16th of February, 1864, Langton & Co. suspended payment, and subsequently, on the 9th of September, 1864, they executed a deed of assignment to the Defendants, Strang, Sieveking, and Pack, as trustees for the benefit of their creditors. While the Maastrom was still lying in the port of Copenhagen, Berndtson caused the captain to be served with a notice, dated the 24th of March, 1864, to stop the timber in transitu.

On the 26th of April, 1864, the Maastrom arrived in the Thames, whereupon a second notice of stoppage in transitu was served on board the ship and also on the shipbrokers, and on Messrs. Churchill & Sim.

The timber was taken possession of by Churchill & Sim as mortgagees, and a sum of £1276. 15s. 6d. was produced by the sale of it. The proceeds of the timber, with the moneys received under the policy, amounting in all to £1570., had been paid into Court by Messrs. Churchill & Sim, who had been satisfied out of their other securities.

The bill of exchange for £1744. 19s. was dishonoured at maturity.

The proceeds of the timber having been claimed by the trustees of the creditors' deed executed by Langton & Robinson, this bill was filed by Berndtson, charging that, by the exercise of his right of stopping the timber in transitu, he was entitled in equity to a valid and subsisting charge for the money due in respect of the price of the timber, and praying relief upon this footing.

A dividend of 5s. in the pound on the whole amount of his claim on the estate had been paid to the Plaintiff by the trustees of the creditors' deed without prejudice.

Sir W. Page Wood, V. C. The question in this case is, whether the Plaintiff is entitled to such a declaration as was made in Spalding v. Ruding, 6 Beav. 376, of his equitable right of stoppage in transitu over certain timber sold by him, and for the price of which bills of exchange were drawn, which were unpaid at the time the consignees became insolvent; the question being whether, under all the circumstances of the case, the consignees having simply mortgaged the bills of lading, which brings the case so far within Spalding v. Ruding, the plaintiff is entitled to the surplus assets as against the Defendants, who are the representatives, under a deed of composition, of the original consignees.

Spalding v. Ruding was, I think, the first case in this Court in which this right was asserted as against property which had so far passed into the hands of the consignee that he was enabled by mortgage of the bills of lading to pass the interest in the goods to the extent of that mortgage; and there the right of stoppage in transitu was upheld as against the surplus.

The case, which was originally decided by Lord Langdale, and affirmed by Lord Lyndhurst, 15 L. J. (Ch.) 374,[9] was no doubt in some degree, an extension of what was supposed to be the right of the consignor. In some of the cases there were dicta which seemed to shew that by the indorsement of the bill of lading in such a manner as to admit of a dealing with it, and by actual dealing with, or actual negotiation of such bill of lading to a bona fide transferee, the vendor's right to stop in transitu would be defeated. That was the great ground of argument in Spalding v. Ruding, 6 Beav. 376, and I mention the case as shewing the extent to which the right has been upheld, and that it is a right entirely distinguished from the right of property in the goods.

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[9] Lord Lyndhurst's judgment was as follows:
"The Plaintiffs, as the shippers of the goods in question, would have had a

The Plaintiff in this case sold to Messrs. Langton, who have become insolvent, certain timber under a contract of sale, specifying the price, "free on board, payable by buyer's acceptance of seller's drafts at six months from date of bills of lading. Shipment to London." It was also provided that the sellers were to provide ships.

A good deal was said about these words "free on board," but as regards the original contract it would be plain enough that there was no intention that the goods should be at their destination when they were free on board, as not only was London the place of destination, but the seller was to find the vessel, and undertook that the goods should be delivered in London. Although the property in the goods might well pass when the bill of lading was handed over in exchange for the accepted bills, still that does not determine the question as to the right to stoppage in transitu, the distinction being well established upon all the authorities, and especially referred to in Van Casteel v. Booker, where during the argument, Mr. (now Baron) Martin, so far conceding against the interest of his client, says (2 Ex. 699): "The general rule is that if goods are shipped on board a chartered vessel the property vests in the consignee, subject to the right of stoppage in transitu; but if the goods are placed on

right at law to stop them in transitu as against Thomas, the vendee, by reason of his insolvency; but by the indorsement of the bills of lading to the Defendant (Ruding) for value, that right was taken away. The question then is, what right the Defendant had acquired against the vendors by their transactions with Thomas. The bill of lading, &c., were transferred to them by Thomas, to secure the repayment of the £1000, the sum advanced to Thomas by means of the Defendant's acceptance. This I consider to be the true construction and effect of the memorandum or letter of the 9th of June, 1841. They had a clear right, therefore, to retain the goods, and to be paid out of the proceeds to the extent of those advances according to the terms of the agreement. They had both a legal and an equitable right to this extent. In this state of things the vendors attempt, by a notice to the captain, to stop the goods in transitu. This, I think, upon the evidence, was given in time and though not good in law, by reason of the assignment of the bills of lading, would, I am of opinion, be valid in equity against both the vendee and the Defendant so as to vest in Plaintiffs a right to the surplus of the produce of the wheat, after discharging the sum for which it was pledged. The Defendant could not, under these circumstances, retain the surplus as against the vendors towards the liquidation of his general balance due to Thomas the vendee. If this view of the case be, as I think it is, correct, it was proper for the decision of a Court of equity, and the appeal must be dismissed with costs."

board the purchaser's own ship, that is an absolute delivery—the same as if placed in his cart. The shipper may, however, protect himself by taking a bill of lading making the goods deliverable to his own order only; but in that case the property would pass as soon as he indorsed the bill of lading generally."

In the same way, Lord Chelmsford, in Schotsmans v. Lancashire and Yorkshire Railway Company, Law Rep. 2 Ch. 337, says in reference to the case of Mitchel v. Ede, 11 Ad. & E. 888: "It appears to me that this case was not decided upon the distinction between a general ship and one sent for the express purpose of receiving the sugar; for if it had been a question of stoppage in transitu upon a sale of the sugar to the Defendants, and it had been delivered into the Defendants' own vessel, sent out for the purpose, although the property in the goods would have passed, yet the effect of the delivery would have been restrained by the indorsement of the bill of lading, and the right to stop in transitu would have been preserved."

Much stress has been laid upon those words "free on board," as being an indication of the nature of the contract—that the transitus was at an end when the goods were on board the purchaser's own ship. But those words cannot have any such effect in a contract framed as this was, where the intention, as expressed by the contract, was, that there was to be no delivery on board the purchaser's own ship, as the vendor was to find a ship (although at the cost of the purchaser), and send the ship, with the cargo, to London, where the transitus would be at an end. That contract, however, was waived by parol, by the arrangement subsequently made, under which the vendor was no longer to find a ship, but was discharged from that part of his engagement. A ship chartered by the purchaser is sent out from London for the purpose of taking on board this cargo, subject, of course, to the payment of freight when the cargo should be delivered pursuant to the charter party. That being so, the vendor takes the additional precaution, notwithstanding the purchaser charters the ship, of taking the bill of lading in this form: "Shipped by him (the vendor), to be delivered at the port of London, unto order or to assigns." The bill of lading having been taken in this form the bills of exchange are drawn and accepted, and while the ship was on her voyage the bill of lading was indorsed in blank—a circumstance very strongly relied upon by Mr. Druce—and delivered to the purchaser in exchange for the accepted bills of exchange. No doubt the property in the goods would pass, but that does not determine the question whether the transitus was at an end. With the single exception that the bills of lading are made out in the name of the vendor to his order, or assigns, and then by him indorsed in blank, the case does not really differ from Bohtlingk v. Inglis, 3 East, 381, nor from Spalding v. Ruding, 6 Beav. 376, where the purchaser had the bill of lading handed over to him so as to vest the property in him.

Does, then, the shipping of goods, in the name of the vendor, and indorsing over the bill of lading, show an animus on the part of the vendor to part with his lien and abandon his right of stoppage in transitu? Now there are two criteria, as it appears to me, with respect to the stoppage in transitu, viz.: whether there is a transitus at all? and if so, where it is to end? If a man sends his own ship, and orders the goods to be delivered on board his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery and the transitus is at end, just as much (as was said in Van Casteel v. Booker, 2 Ex. 691) as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further transitus after the goods are in the purchaser's own cart. There they are at home, in the hands of the purchaser, and there is an end of the whole delivery. The next thing to be looked to is, whether there is any intermediate person interposed between the vendor and the purchaser. Cases no doubt may arise, where the transitus may be at an end although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself and about to sail on a roving voyage. In that case, when the goods are on board the ship everything is done; for the goods have been put in the place indicated by the purchaser, and there is an end of the transitus. But here, where the goods are to be delivered in London, the Plaintiff, for greater security, takes the bill of lading in his own name, and, being content to part with the property in the goods, subject or not, as the case may be, to this right of stoppage in transitu, he hands over the bill of lading in exchange for the bill of exchange. In that ordinary case of chartering it appears to me that the captain or master is a person interposed between vendor and purchaser in such a way that the transitus is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession, until the voyage is terminated and the freight paid according to the arrangement in the charter party.

Bohtlingk v. Inglis, 3 East, 381, which has been frequently cited, and never, as far as I can discover, with disapprobation, seems to have furnished the rule which was alluded to in argument in Van Casteel v. Booker, 2 Ex. 691, viz., that if the goods are delivered on board a chartered ship, the property vests in the consignee, subject to the right of stoppage in transitu. Mr. Justice Lawrence, in delivering the judgment of the Court, says (3 East, 395): "For the benefit of trade, a rule has been introduced into the common law, enabling the consignor, in case of the insolvency of the consignee, to stop the goods consigned before they come into the possession of the consignee, which possession Buller, J., in Ellis v. Hunt, 3 T. R. 466, says, means an actual possession. That the possession of a carrier is not such a possession, has been repeatedly determined, and the question now is, whether the possession of the master be anything more than the possession of a carrier, and not the actual possession of the bankrupt. * * * It does not differ from a similar contract entered into by the consignor, by the directions of the consignee, at the loading port, for the conveyance of the goods from him to the vendee." In other words, it would be exactly like the original engagement in the present case, and the circumstance of the consignee being the person who provides the ship, makes really no substantial difference whatever—"in which case it would hardly be contended that a delivery by the consignor to the master of the ship for the purpose of carriage, would be such a delivery to the vendee as to prevent the right of stoppage in transitu. In each case the freight would be to be paid by the consignee; in each case the ship would be hired by him; and there would be no difference, except that in this case the ship, in consequence of the agreement, goes from England to fetch the cargo,"—just as in the case now before me—"in the other case, the vessel would bring it immediately from the loading port; both in the one case and in the other the contract is with the master for the carriage of the goods from one place to another; and until the arrival of the goods at their point of destination, and delivery to the consignee, they are in their passage or transit from the consignor to the consignee."

The learned Judge distinguishes the case from that of Fowler v. Kymer, cited in Hodgson v. Loy, 7 T. R. 442, where the ship, being under the complete control of the bankrupt, had the goods put on board her, not for the purpose of conveying them from the consignors to the consignees, but that they might be sent by the consignees upon a mercantile adventure for which they had bought them, and there the delivery to the consignees, being at the place pointed out by them where the delivery should be, was held to be complete. Of course the place of delivery may be as well on board the ship as at the port of her destination. The case of Van Casteel v. Booker, 2 Ex. 691, does not appear to me to make any substantial difference. There it was the vendee's own ship, and, as was said by Parke, B., in the judgment, if the goods were put on board to be carried for and on the account and risk of the bankrupts, the delivery on board put an end to the right of stoppage in transitu; but the vendor took the precaution which was held effectual in Turner v. Trustees of Liverpool Docks, 6 Ex. 543, of restraining the effect of that delivery by the indorsement on the bill of lading. The Court there (Van Casteel v. Booker, 2 Ex. 691), seems to have thrown out that this precaution stopped the effect of putting the goods on board the vendee's own ship, and indicated an intention not to part with the dominion over the goods, nor vest the absolute property in the bankrupts. The case before me is still stronger, as although the vendor has taken this precaution in order to guard himself against any possible contingency, still the ship is the instrument of transit, and in parting with these bills of lading in exchange for the bills of exchange, he is aware that the ship has been chartered for the purpose of delivering the goods at the port of London, and that the master of the ship was not the servant of the vendee, but an intermediate agent who, for hire, when the hire was paid, was to deliver the goods in London.

It appears to me, therefore, that until the goods reach London the transitus is not ended. Cowasjee v. Thompson, 5 Moo. P. C. 165, differs in every respect from this case. There a ship was sent out, goods were ordered for that ship, and the ship being the property of the person sending her out, the transitus was complete when the goods were delivered on board pursuant to order, nothing else being directed or intended by anybody. Again in Schotsmans v. Lancashire and Yorkshire Railway Company, Law Rep. 2 Ch. 332, the ship was the ship of the vendee, and the vendor did not take the precaution of preserving his right of stoppage in transitu by making the goods deliverable to his order or assigns; the goods by the bill of lading being made deliverable to the purchaser or assigns. The whole case here appears to me to turn upon whether or not it is the man's own ship that receives the goods, or whether he has contracted with some one else qua carrier to deliver the goods, so that, according to the ordinary rule as laid down in Bohtlingk v. Inglis, 3 East, 381, and continually referred to as settled law upon this subject, the transitus is only at an end when the carrier has arrived at the place of destination, and has delivered the goods.

I must, therefore, follow the decision in Spalding v. Ruding, 6 Beav. 376, and declare the plaintiff entitled out of the fund in Court to the balance due upon the bill of exchange, with interest from the date of maturity.

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## Ex parte ROSEVEAR CHINA CLAY CO.

## In re COCK.

(Court of Appeals, 1879. 11 Ch. Div. 560.)

David Cock was a china clay merchant at Roche, near St. Austell. On the 20th of November, 1877, he wrote to the Rosevear China Clay Company, whose works were at Roche, but whose office was at Cardiff, as follows:

"Your favour respecting china clay to hand. I have this morning been on the works and taken several samples of what is now in stock. I regret very much to assert that what appears to me to have been put in the clay by way of adulteration will prevent me from purchasing. It might and probably would be ruinous to all my connection. There are about 100 tons of the old stock which has not been so treated, and which I would purchase at 15s. per ton, f. o. b. Fowey, payment to be by four months' acceptance from date of bill of lading. Same to be shipped during this month, or, if not, bill to date from 1st December. Waiting favour of your reply, "Yours truly, [Signed] David Cock."

On the 27th of November Mr. Carr, the company's secretary replied as follows:

"We now offer you the balance old Rosevear make, 80 to 100 tons, at 15s. per ton f. o. b. Par or Fowey, 4 months' draft dated from 1st December whether shipped or not. Please say if you confirm this."

On the 30th of November Cock replied as follows:

"I am in receipt of your favour of 27th November, accepting my offer for the old stock of china clay at Rosevear, which I now confirm."

On the 1st of December Mr. Carr replied as follows:

"I am in receipt of yours of 30th ult., which is two days over return post. This delay of your confirmation of the purchase has left the matter open for others. But, as we have not definitely closed, if you are prepared to have the clay offered you taken on board within fourteen days from the date of my offer, and accept our draft from 1st December at four months next, we will withdraw from confirming sale to another party, but you must reply here definitely 4th inst., or the matter falls through."

On the 12th of December Cock replied:

"I have a vessel of 215 tons which will load at Fowey on Friday next, so now I can take your 100 tons of Rosevear clay upon your terms as per your last letter. Let me know not later than Friday morning if I am to have the clay or not."

On the 13th of December a clerk of the company replied:

"In reply to yours of 12th inst., I beg to say, in the absence of Mr. Carr, who is away from home, we will sell you the 80 to 100 tons china clay (old Rosevear make) as per conditions mentioned in Mr. Carr's letters to you of Nov. 27 and Dec. 1. I have instructed Captain Dyer by this post to send the name to Fowey at once."

On the 27th of December Mr. Carr wrote to Cock:

"Mr. Dyer has handed account to day by letter which makes 108 tons 2 qrs. 2 cwt. clay as shipped for your account, value £81. 1s. 10d. There is an old balance due to us of £11. 7s. 8d. Do you wish this added to the draft £81. 1s. 10d? If so, I have no objection, and will send draft for your acceptance in a day or two."

Cock had on the 5th of December entered into a verbal agreement to charter a ship, called the Forester, to call at Fowey, to convey the clay for him, with other clay, to Glasgow, consigned to an agent there for sale. No charter party was signed. On the 29th of December the company delivered 100 tons of the clay on board the Forester at Fowey. No bill of lading was signed. Cock did not reply to Carr's letter of the 27th of December. He was in fact insolvent, and had committed an act of bankruptcy on the 24th of December by absconding. On the 31st of December the company, having heard that he was insolvent, gave notice to the master of the Forester, which was still in Fowey harbour, to stop the clay in transitu. The master afterwards signed a bill of lading in favour of the company, and by their directions the clay was taken to Runcorn instead of to Glasgow, and was there sold on their account. Cock was ultimately adjudicated a bankrupt in the Truro County Court.

The trustee in the bankruptcy claimed the value of the clay, on the ground that the transit was at an end when it was shipped on board the Forester, and that therefore the notice to stop in transitu came too late. The trustee applied to the County Court for an order that the company should pay over to him the invoice price of the clay. On the hearing of the application the bankrupt was examined, and said: "I was in the habit of buying and sending clay all over the country. I did not inform the Rosevear Company of the destination of the clay. I never used to reveal the ultimate destination of cargoes. I communicated the name of the vessel to the vendors on the 12th of December." The invoice of the clay and the bill of exchange for acceptance were sent through the post by Carr to Cock on the 29th of December, but the bill was never accepted.

The Judge of the County Court was of opinion that it was the intention of both the parties that the property in the clay should not pass to the purchaser until the bill of exchange for the price had been accepted by him. But, even if the property did pass, His Honour was of opinion that the clay never came into the possession of the bankrupt, that the transitus was not at an end when it was placed on board the ship, and that consequently the company had a right to stop in transitu, which right they had effectually exercised. His Honour, therefore, refused the trustee's application.

The trustee appealed to the Chief Judge. The appeal was heard on the 3rd of February, 1879.

Bacon, C. J. I cannot see what the bill of lading has to do with this question. No doubt the vendors might, if they had thought fit, have taken a bill of lading, which would have secured, not the possession of, but a right to, the property mentioned in the bill of lading; but they did not. Their omission to do so cannot be used in their favour.

The transaction is as plain a one as was ever stated. A man wants to buy china clay, a heavy commodity, a thing which he cannot carry in his own waggons, and does not mean to do so, but he tells the company that he will get a ship to transport this clay which he buys of them. He afterwards gives them the name of the ship, and directs them to deliver the clay which he has bought on board that ship. If it had been a warehouse instead of a ship, could there be any doubt that after the clay had been carried to the warehouse the transitus would have been at an end? I have no doubt that the transitus, such as it was, ended when the clay arrived upon the quay at Fowey and was put into the ship Forester, which the bankrupt had hired for the very purpose of carrying it. Valpy v. Gibson is directly in point on the part of the case which I am now considering. There there was that which was a little more remarkable, and which probably gave rise to some argument. The vessel in which the goods were to be shipped was destined for Valparaiso, and the vendors of the goods wanted some patterns or cards of theirs to be sent along with the goods, and, knowing well enough that the ship was going to Valparaiso, they gave a direction to that effect when they delivered the goods. The Court decided that, when the goods were delivered upon the ship, which had been hired for the purpose of transport by the purchaser, there was an end of the transit. Delivery "free on board" only means "The price shall be that which we stipulate for, and you shall not have to pay for the waggons or carts necessary to carry the clay from the place where it is dug; we will bear all those charges and put it free on board the ship, the name of which you are to furnish."

I cannot think that any question arises. The fact that the bill of exchange had not been accepted does not alter the case in the slightest degree. On the 29th of December the china clay, which had been bought and sold, was by the vendors placed on board the ship; they never thought of taking a bill of lading, or of retaining any right over it, but they delivered it to the man who had bought it of them. There is no doubt upon the facts of the case, and there can be no doubt whatever about the law. There was no transit, except from the quarry to the ship's side; the transit was ended so soon as the clay was on board the ship, and the right to stop it was therefore entirely gone. None of the cases which have been referred to give any kind of colour to the claim raised on the part of the vendors to have this clay treated as still belonging to them, although they had delivered it free on board in the manner and at the price stipulated for in the contract between the parties.

However, the learned Judge of the County Court took a very different view of the subject. He seems to have bestowed a great deal of attention upon it, and to have considered many cases, the bearing of which on the question before me I have not been able to perceive; but, as he gave a very deliberate and considered judgment, which is entitled to all respect, and as, moreover, he invited the parties to take the case up to the highest Court, I am content that it should go there. But I should be sorry if it went with any expression of doubt on my part. I am clear that this is a case in which the vendor's right of stoppage in transitu ceased to exist the moment the clay was put on board the ship.

From this decision the Rosevear Company appealed. The appeal was heard on the 24th of April, 1879.

James, L. J. With all respect for the decision of the Chief Judge, I am of opinion that this case cannot be distinguished from the authorities which have been referred to, in particular that of Berndtson v. Strang. The authorities show that the vendor has a right to stop in transitu until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right the goods must be in the hands of the purchaser or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary. It is admitted that if it had been mentioned in the original contract for sale that the goods were to be carried to Glasgow the present case could not have been distinguished from Berndtson v. Strang, but it is said that the fact that no ultimate destination was mentioned affords a distinction. It seems to me, however, that the mere fact that the port of destination was left uncertain, or was changed after the contract for sale, can make no difference.

The principle is this—that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier. I am of opinion that in the present case, although the vendors' liability was at an end when they had delivered the clay on board the ship, which indeed is the case in most instances of stoppage in transitu, that did not deprive them of the right to stop in transitu so long as the clay was in the possession of the master of the ship as a carrier. To use the language of Lord Cranworth (then Baron Rolfe), in Gibson v. Carruthers, 8 M. & W. 321, 328, "I consider it to be of the very essence of that doctrine, that during the transitus the goods should be in the custody of some third person, intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession," and that language was adopted by Vice-Chancellor Wood, and by Lord Cairns in Berndtson v. Strang, Law Rep. 4 Eq. 481; Id., 3 Ch. 588, 590. The clay in the present case was delivered to a third person intermediate between the vendors and the purchaser, and therefore the vendors still had a right of stoppage in transitu.

Brett, L. J. It seems to me that there was a binding contract between the vendors and the purchaser, though by it alone the property in the clay did not pass to the purchaser. But, as soon as the clay was appropriated by the vendors to this contract, and was placed on board the ship, the property in it passed to the purchaser, and at the same time, as between the vendor and the purchaser, there was a delivery of the clay to the latter. But it was a constructive, not an actual delivery. If the contract had been to deliver to the purchaser at Fowey, and the clay had been there delivered to him or to his agent, and he or his agent had then shipped it, I should have thought that after that there would have been no transit. But the contract was to deliver at Fowey, on board a ship, and to deliver free on board, that is, the vendors undertook the delivery of the goods. The ship was to be chartered by the purchaser, and he must charter the ship to carry the clay to some port.

The distinction taken by Mr. Northmore Lawrence is an ingenious one, but it seems to me that it can make no difference whether the destination of the goods is communicated to the vendor at the time of the contract for sale, or whether the destination is to be named after the contract but before the shipment. Here the purchaser entered into an agreement with the owner of the ship that the ship should take the clay to Glasgow, and the vendors were bound to put the clay on board that ship to be carried to Glasgow. It was not the purchaser's own ship, but that of the shipowner, and the clay when delivered on board was to be carried to Glasgow. The question is whether the transit was at an end before the arrival of the ship at Glasgow? It seems to me that several decided cases show that it was not. In James v. Griffin, 2 M. & W. 623, Baron Parke laid down the law thus (Id. 632): "Of the law on this subject, to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right, if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession." The distinction there taken is between a constructive and an actual delivery to the purchaser, and he says that if there is only a constructive delivery to the purchaser the transit is not over until the goods have been actually delivered to him or his agent.

Then, in Berndtson v. Strang, Law Rep. 3 Ch. 588, the test put by Lord Cairns is, whether the goods have been delivered only to a carrier, although he may have been named by the purchaser. There the ship had been chartered by the purchaser, and therefore, when the goods were placed on board there was a constructive delivery to him. Yet, because the goods were in the hands of the shipowner as carrier, it was held that the transit was not over until that carriage was over. So, too, in Smith's Leading Cases, in the notes to Lickbarrow v. Mason (7th Ed.) vol. 1, p. 818, it is said: "The rule to be collected from all the cases is, that the goods are in transitu so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee."

In the present case the clay was placed on board the ship for the purpose of being carried to Glasgow; it was in the actual possession of the shipowner, and only in the constructive possession of the purchaser. Therefore the right of stoppage in transitu existed. If the purchaser had been the owner of the ship, the vendors would have had no such right, unless they had reserved it by express stipulation. But, in the actual state of things, I think that, both on principle and on the authorities, the transit was not over and the right to stop in transitu remained.[10]

## BETHELL & CO. v. CLARK & CO.

(Court of Appeals, 1888. 20 Q. B. Div. 615.)

The facts are fully stated in the report of the case in the court below (19 Q. B. D. 553). For the purposes of this report they may be briefly stated as follows:

The special case was stated on interpleader proceedings to determine the title to the possession of certain goods. The goods had been sold by Clark & Co., ironfounders at Wolverhampton, to Tickle & Co., of London. The order for the goods did not specify any place to which they were to be sent, but on June 28, 1885, the purchasers wrote the vendors as follows: "Please consign the ten hogsheads of hollow ware to the Darling Downs, to Melbourne, loading in the East India Docks here." The goods were delivered by the vendors to the London and North Western Railway Company, to be forwarded to the ship. They were accordingly sent by railway to Poplar, and taken thence to the ship in lighters by the Thames Steam Tug and Lighterage Company, as agents of the railway company, a mate's receipt being taken for them on shipment, which was forwarded to the purchasers. The vendors being informed that the purchasers were insolvent gave notice to the railway company to stop the delivery of the goods on board the ship; and the railway company gave a similar notice to the lighter company, but too late to prevent the shipment of the goods on the Darling Downs. Bills of lading for the goods in accordance with the mate's receipt had been made out and signed ready for delivery, but, not having been applied for at the time, they remained in the possession of Bethell & Co., the owners or agents for the owners of the Darling Downs, who were stakeholders in the interpleader. Shortly after the shipment the Darling Downs proceeded to Melbourne with the goods on board, but before she arrived at Melbourne the vendors wrote to the shipowners claiming the goods as their property.

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[10] A concurring opinion was delivered by Cotton, L. J., and the appeal was allowed, with costs.

A petition in bankruptcy having been filed by the purchasers of the goods, a scheme of arrangement was sanctioned by the creditors, and a trustee appointed to administer their estate and effects. The goods being claimed by such trustee and also by the vendors, the shipowners interpleaded. The question for the Court was whether the trustee or the vendors were entitled to the possession of or property in the goods.

The Court below (Mathew and Cave, JJ.) gave judgment for the vendors on the ground that the right of the vendors to stop the goods in transitu continued till they arrived at Melbourne.

Lord ESHER, M. R. In this case the vendors being unpaid and the purchasers having become insolvent, according to the law merchant the vendors had a right to stop the goods while in transitu, although the property in such goods might have passed to the purchasers. The doctrine of stoppage in transitu has always been construed favourably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage in transitu exists: but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are in transitu afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit.

The question is, under which of these heads the present case comes. In this case the contract does not determine where the goods are to go. It is argued for the vendors that directions were given by the purchasers to the vendors that the goods should be forwarded by carriers to Melbourne, so that while they were in the hands of any of the different sets of carriers who would necessarily be employed in so forwarding them, and until they arrived at Melbourne, they were still in transitu. The question, whether that is so, is a question of fact in the particular case. The goods were purchased at Wolverhampton, and, after the contract was made, the purchasers gave directions once and once only as to what was to be done with them. It was argued that those directions were to deliver them on board a particular ship in the East India Docks, and that there were no directions beyond the directions for such delivery, but that a fresh direction as to the ultimate destination of the goods would be required; and therefore the original transitus was at an end when the goods were put on board the ship. That question turns on the true construction of the letter of June 28, which says: "Please deliver the ten hogsheads of hollow ware to the Darling Downs, to Melbourne, loading in the East India Docks here." The argument really amounted to saying that the meaning was that the goods were to be delivered on board the ship to be kept by those in charge of her as in a warehouse, and subject to orders from the purchasers either to deliver the goods back again out of the ship or to take them on where the ship was going. That cannot be the business meaning of the transaction. Here we have a ship loading in the docks for Melbourne, and the captain would have no authority to receive goods on board as a warehouseman, or for any purpose but to be carried to Melbourne. The meaning is that the goods were to be delivered on board to be carried to Melbourne. What would be the mode in which they would be so delivered? They would be put on board and the mate's receipt would be taken for them, the terms of which would show that the goods were received for carriage to Melbourne, and a bill of lading would afterwards be signed in the terms of such receipt. That is what was done here.

It follows, in my opinion, that those goods were in the hands of carriers as such, and in the course of the original transitus from the time they left Wolverhampton till they reached Melbourne. The case therefore falls within the doctrine of stoppage in transitu, and is not within the class of cases where, goods going through the hands of a number of carriers, at some stage in the process fresh directions are required from the purchaser as to further carriage. Here no such further directions were required. The letter of June 28 gives all the directions necessary for the transit to Melbourne. It is not necessary to refer to all the authorities cited. The argument of the counsel for the trustee is directly met by what was said by Bowen, L. J., in Kendal v. Marshall Stevens & Co., 11 Q. B. D. 356, at p. 369. He there said: "Where goods are bought to be afterwards dispatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination. In Coates v. Railton, 6 B. & C. 422, several cases were cited by Bayley, J., in the course of his judgment, and the principle to be deduced from them is, that where goods are sold to be sent to a particular destination, the transitus is not at an end until the goods have reached the place named by the vendee to the vendor as their destination." In Ex parte Miles, 15 Q. B. D. 39, I cited the test laid down by Lord Ellenborough in Dixon v. Baldwen, 5 East, 175, where he says, "The goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary;" and, applying that rule to the case then before me, I held that the goods had in that case got to the end of their journey when they arrived at Southampton. That would not be the case here; when the goods were put on board the ship, they would be in motion without any fresh orders being necessary until they reached Melbourne.

Therefore, in my opinion, the right to stop in transitu still existed, and was rightly exercised by the vendors. I think the decision of the Court below was correct, and that this appeal must be dismissed.[11]

## MEMPHIS & L. R. R. CO. v. FREED.

(Supreme Court of Arkansas, 1882. 38 Ark. 614.)

Freed, a merchant at Dardanelle, ordered of Walker Bros. & Co., merchants at St. Louis and Memphis, a bill of dry goods. Walker Bros. & Co. transmitted the order to Lehman, Abrahams & Co., merchants at New Orleans, with directions to ship the goods to Freed, at Dardanelle, and send the invoice and bill of lading to them. Lehman, Abrahams & Co., filled the order and shipped the goods to Freed, by way of Hopefield, charged them to Walker Bros. & Co., and sent the invoice and bill of lading to them, and they charged the goods to Freed.

At Hopefield the goods were delivered to the defendant company, to be transported on their road to Argenta, and thence, to be forwarded to Freed, at Dardanelle. While the goods were in transit from New Orleans, Walker Bros. & Co. failed, and Lehman, Abrahams & Co. claiming the right of stoppage in transitu, demanded the goods from the defendant company, and they were delivered to them.

Freed then sued the company for the value of the goods, for not delivering them as contracted in their bill of lading. Upon the trial, the defendant objected to the introduction of the following testimony of Freed:

"That early in October, 1879, he sent an order to Walker Bros. & Co., of St. Louis, Mo., to send him some sheeting and yarn, which were the same mentioned in the complaint, and the same were charged to him by Walker Bros. & Co. That the following was a copy of a letter sent by Lehman, Abrahams & Co., of New Orleans, to Walker Bros. & Co., to-wit:

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[11] Concurring opinions were delivered by **Fry** and **Lopes**, L. JJ.

"'New Orleans, La., October 28, 1879.

"'Messrs. Walker Bros. & Co., St. Louis:

"'Sirs—We enclose bill of lading and invoice of goods shipped to C. M. Freed, as per your instructions, amounting to $507.44, for which please credit our account. We shipped the goods via Hopefield.

"'Yours truly, Lehman, Abrahams & Co.'"

The objection to this testimony was overruled, and after other testimony, showing the facts above stated, there was a verdict for the plaintiff, and from final judgment the defendant appealed.

Eakin, J.[12] There was no error in admitting the testimony of plaintiff, Freed, to show that he had ordered the goods from Walker Bros. & Co. The right of stoppage in transitu does not arise from any contract between the parties. It is a commercial right, arising from the circumstances; and it is competent to show the facts. The fact intended to be shown, by this testimony, was, that the plaintiff, Freed, to whom the goods were shipped, was the real owner, by purchase from Walker Bros. & Co., and that the goods were not shipped to him, as the agent of Walker Bros. & Co., who ordered them from the New Orleans firm, and directed them to be sent to Freed at Dardanelle; but that the goods, if they had come to his possession, would have been received by him, not as the goods of Walker Bros. & Co., but as his own. In other words, it tended to show that the relation of vendor and vendee did not exist between him and the consignors, but between him and the firm of Walker Bros. & Co.; and that there was never any consignment, or transitus of the goods to the original purchasers, either in their own names, or to them in his name, as agent.

If he had really been the agent of Walker Bros. & Co., or under any obligations to receive the goods for them, the right of Lehman, Abrahams & Co., the consignors, to stop them in transitu could not be doubted; but, as he had never had any transactions with Lehman, Abrahams & Co., and had never represented himself to them as the agent of the purchasers; and as he had made himself responsible to Walker Bros. & Co., and would have received the goods absolutely as his own property, in his own right, if they had not been intercepted, then it becomes a grave question whether or not the right of stoppage in transitu ever existed at all; or, if it existed, whether it should not be considered as existing in Walker Bros. & Co., the real vendors to Freed, upon his insolvency, if it had occurred. It was proper to bring before the court all the facts showing the actual status or condition of things, that it might determine the rights of the parties, within the scope to which the doctrine of stoppage in transitu extends. To such cases the prohibition against showing res inter alios acta does not always apply.

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[12] Part of the opinion is omitted.

The true state of the case, as developed by the record, is simply this: Lehman, Abrahams & Co., upon the request of Walker Bros. & Co., and taking them as paymasters, shipped goods to Freed, at a point distant from the business place of either. It was never contemplated, from anything that appears, that the goods were intended to reach Walker Bros. & Co., or their agents, or to come into their possession. The fact is, they were not; and there is nothing from which the shippers might fairly have presumed an intention on the part of Walker Bros. & Co. to take control of them at their destination, or retain any property in them. Freed remains solvent. Walker Bros. & Co. became insolvent, and the goods were redelivered, by the carrier, to Lehman, Abrahams & Co., before they came to Freed's possession.

Is the carrier responsible to Freed for that? The goods became his property, on consignment, absolutely and against all the world, subject only to the carrier's lien for freights; which, under the circumstances, it would have been idle to tender; and any right of stoppage in transitu which might exist. Had Lehman, Abrahams & Co., that right? If not, the action of the court is correct. If they had, it must be reversed.

In the present condition of commerce, it is not uncommon, as in this case, for purchasers to direct their vendors to consign the articles to customers of the former, with whom the shippers have no privity whatever.

The distinction between vendor and consignor and vendee and consignee, sometimes lost sight of in the old cases, has thus become a matter of vast importance, in these triangular transactions; and, there being only one transit, it is a weighty matter to determine who, during that transit, has the right of stoppage, and upon whose insolvency; whether, in this case, it would have been in Walker Bros. & Co., or in Lehman, Abrahams & Co., on the insolvency of the consignee, Freed, if in either. It could not have been in both; for that would produce an unseemly conflict. If in Lehman, Abrahams & Co., the contingency has not arisen; for Freed is not insolvent. If in Walker Bros. & Co., upon what principle can it, on their insolvency, arise in favor of the New Orleans consignors, against the solvent vendee of Walker Bros. & Co.? If in neither, in case of Freed's insolvency, but only in Lehman, Abrahams & Co., in the contingency of the insolvency of Walker Bros. & Co., then we have the case presented of a solvent consignee, ready and willing to pay for his goods, subject to have them taken upon the default of a party for whom he is not liable, and whose actions he cannot control. If more attention had been paid in the discussions, to the distinction between consignee and vendee, and consignor and vendor, the decisions would have cast, on this point, more light than we now have.

A review of the authorities shows that the right has never been applied in cases where the consignor claiming it has not been the vendor, and the consignee (upon whose insolvency it arises) the purchaser and debtor. Lord Chancellor Baron Eyre remarked, in Kinloch et al. v. Craig, in 1790 (3 Term Rep. 787), that the right never occurred, but as between vendor and vendee.

It will simplify the matter to bear in mind when the terms "consignor" and "consignee" are used, that by the former is meant a vendor who ships, and by the latter, a purchaser to whom they have been sent. It is the real interest on one side and liability on the other, which gives the right; not the technical designation of the parties in the bill of lading. See notes to case of Lickbarrow v. Mason, Smith's Leading Cases, vol. 1, p. 901.

It is equally clear, from all the cases, that the right has never been exercised, save upon the transit of the goods from a vendor to the purchaser from him.

Freed bought the goods from Walker Bros. & Co. They were his vendors and to them only was he liable. There can be no doubt that if the goods had taken their natural course, and been shipped by the original owners to Walker Bros. & Co., their vendees, the right of stoppage would have attached against the latter, upon their insolvency; and the goods might have been reclaimed during that transit. But if they had reached Walker Bros. & Co., and been by them reshipped to Freed, at Dardanelle, it is equally clear that the original vendors would, on that transit, have had no right of stoppage, in any event; but it would have been in Walker Bros. & Co., upon the contingency of Freed's insolvency. Quite as clearly, Freed never contemplated, nor can be presumed to have assented to any other or different right of stoppage of the goods, than in case of his own insolvency, on the transit from his vendors to himself.

Neither transit was used. By agreement between Walker Bros. & Co. and the original vendors, another was adopted, which contemplated that the goods should come to the possession of the vendee of Walker Bros. & Co., without ever reaching Walker Bros. & Co., at all. This was before any shipment, and before Lehman, Abrahams & Co. had parted with possession. It is not like a sale by a purchaser of goods on their transit to himself; because, when the vendor contemplates a transit to his purchaser, and ships accordingly, he cannot be defeated of his right by the conduct of the purchaser during the transit, without his assent, either express, or implied, in case of the assignment of the bill of lading. Here he assents to a different destination before parting with his property; and if he thereby loses his right of stoppage, it is his voluntary act.

A case very nearly in point, as to the rights of parties in this case, is that of Feise et al. v. Wray, 3 East, 93. Browne, a London trader ordered of Fritzing, a Hamburg merchant a quantity of beeswax. Not having it, Fritzing procured the wax from another merchant, a stranger to Browne, (having, with him, no privity of contract), and shipped it to Browne upon the latter's account and risk, drawing bills upon him for the purchase money. Upon the insolvency of Browne, Fritzing, by his agent, stopped the goods in transitu. The assignees in bankruptcy of Browne, brought trover.

In his opinion, Mr. J. Grose remarked, after stating the prominent facts: "There was no privity between Browne and the merchant of whom the wax was purchased." "What is this, then, but the plain and common case of the consignor of goods, who has not received payment for them, stopping them in transitu, before they get to the hands of the consignee? It is said that no such right exists in the case of a factor against his principal. If this were a case of factor and principal, merely, I should find great difficulty in saying that it did. But here, Fritzing may in reality be considered as the vendor; for the name of the original owner was never made known to the bankrupt, but the goods were purchased and the bills drawn in Fritzing's own name; and therefore he stands in the relation of vendor as to Browne."

Lawrence, J., alluded to the argument that the right of stoppage applied solely to the case of vendor and vendee; from which it was contended that Browne must be considered as the principal for whom the goods were originally bought, and that Fritzing was only the factor, or agent; the Hamburg merchant, furnishing the beeswax, being, in fact, the vendor of the bankrupt; and that there was no right of stoppage in Fritzing. He says: "If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to merchants here from their correspondents abroad, to purchase and ship certain merchandise to them. The merchants here, upon the authority of those orders, obtain the goods from those whom they deal with; and they charge a commission to their correspondents abroad, upon the price of the commodity thus obtained. It never was doubted, but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But, at any rate, this is a case between vendor and vendee; for there was no privity between the original owner of the wax and the bankrupt; but the property may be considered as having been first purchased by Fritzing, and again sold to Browne, at the first price, with the addition of his commission upon it. He then became the vendor, as to Browne, and consequently had a right to stop the goods in transitu."

Le Blanc, J., puts the case in this wise: "The situation of Fritzing was that of being employed by Browne to purchase the goods abroad, and to send them to him here. For the purpose, then, of stopping the goods in transitu, they stood in the relative situation of vendor and vendee; though, perhaps, not so as for all purposes. Fritzing pledged his own credit in the purchase of the goods from the original owners; and Browne could not be called upon for the value by the original owners, unless the goods came to his hands and he had not paid or accounted for the value of them to Fritzing, with whom he dealt. Then, clearly, Fritzing had a right to stop them in transitu." And so all the Justices agreed.

I have cited the different expressions of the justices in that case, in order to show the true grounds of their conclusion, and that the differences in the facts between that case and this, would not have been considered material. There the original vendor was not advised of the name of the ultimate purchaser, for whom the goods were intended, but that is mentioned only as conclusive proof of want of privity of contract, and it was upon this want of privity between the original vendor and ultimate purchaser, that the right of stoppage in transitu was to be in Fritzing, the immediate vendor of Browne. In the case in judgment, the want of privity between Lehman, Abrahams & Co. and Freed, is even more marked than if they had not known Freed's name.

The goods were sold on the order and sole credit of Walker Bros. & Co.; the bills made out in their name and at their request, sent to them with the bills of lading.

The vendors need not have inquired nor known anything of Freed. He was nothing to them, nor they to him. The goods were put in a carrier's hands directed to him, simply as a mode of disposition of them, directed by the purchasers.

In the American notes to Smith's leading cases (ubi supra) it is said: "It is not necessary, however, in order to support the right of stoppage in transitu, that the consignor should be the original owner of the goods, or have purchased them on his own account. Although acting as an agent for a commission, and with the view of paying for them ultimately, with funds derived from the consignee, still, if he have obtained them on his own risk and credit, he will be entitled to stop them in transitu, on the insolvency of the latter," citing American cases, and also Jenkyns v. Usborne, 7 Man. & G., 678.

In view of these principles, I think it plain that if Freed had, himself, become bankrupt upon the transit of the goods from New Orleans to Dardanelle, there would have been no right of stoppage in Lehman, Abrahams & Co., and as there would be in Walker Bros. & Co., notwithstanding the goods had been shipped from New Orleans, they being the true owners and vendors as regards Freed, we may safely take this standpoint, and consider, from it, whether or not the former firm, by agreeing to consign upon a transit, burdened with a right of stoppage in behalf of Walker Bros. & Co. upon one contingency, can claim for themselves, a right of stoppage in another; to-wit: the insolvency of Walker Bros. & Co. I have never heard of any case which held that the same goods, or the same transit might be subjected to two conflicting rights of stoppage upon different contingencies. I think it would result that no right of stoppage as to these goods, remained in Lehman, Abrahams & Co., in any event.

Although the contingency upon which they claim that their right arises is the insolvency of Walker Bros. & Co., it is not immediately against them, or to prevent the goods reaching them, that its exercise is attempted. It is to prevent the goods from reaching Freed, who does not stand in the position of a purchaser, during transit, but one who has been accepted by Lehman, Abrahams & Co. before shipment, as the person entitled to receive them, as owner, and not as their vendee. There is nothing in the record to bring this case within the class where the purchaser designates a place of delivery different from his own place of business, for if to be delivered for him, or to his use, at any named place, the right of stoppage remains until he receives them.

Even upon the supposition that Freed has not paid Walker Bros. & Co. for the goods, and might defend a suit against him by pleading this stoppage—a point not necessary to decide—this would then resolve itself into an effort on the part of Lehman, Abrahams & Co. to secure a preference over other creditors of Walker Bros. & Co. by diverting to themselves, the value in goods, of so much of the assets of the latter firm as consists of Freed's debt. If they had such right to save themselves upon a plank of the shipwreck, there was certainly a counter right on the part of Freed to receive his goods and pay for them to whoever might be entitled. He is solvent, and may, in the absence of proof to the contrary, be considered willing to pay for the goods in full. I think it would be difficult, amongst all the cases, to find one where the right of stoppage in transitu has been used to defeat the owner and consignee of goods of their possession, without any default of his own. It cannot be presumed to be a matter of indifference to Freed, whether he shall take his goods and pay for them, or lose them and be excused, and the carrier had no right to decide this for him, and restore the goods to Lehman, Abrahams & Co. * * *

Affirmed.

## WHITEHEAD et al. v. ANDERSON et al.

(Court of Exchequer, 1842. 9 Mees. & W. 518.)

PARKE, B.[13] * * * The law is clearly settled, that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at end: though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action. This is a case of actual possession, which certainly did not occur in the present instance. A case of constructive possession is, where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him. * * *

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[13] The statement of facts and part of the opinion are omitted.

## REYNOLDS v. BOSTON & M. R. R.

(Supreme Judicial Court of New Hampshire, 1862. 43 N. H. 580.)

Bell, C. J.[14] * * * It is insisted that the notice was insufficient, because it was too late, and because a delivery should have been demanded to the messenger. The goods had been called for by the persons who claimed to be the consignees, the freight was paid by them, and a delivery check, as it is called, was given them. This was merely a receipt for the goods to be signed by them, and left with the clerk who had charge of the goods, upon their receipt of them. They were not delivered to nor seen by the claimants. There were other things in the way of a delivery, and they were told they would be ready about five o'clock. If these constituted a delivery in law, so as to terminate the transitus, the notice given in behalf of the plaintiff was too late.

It was long held that the right of stoppage in transitu could be terminated only by an actual delivery of the goods to the consignee or his agent. Cross on Lien, 370; James v. Griffin, 2 M. & W. 623; Edwards v. Brewer, 2 M. & W. 375; Ellis v. Hunt, 3 T. R. 404; 2 Kent, Com. 545; 1 Smith, L. C. 907. The later cases furnish some exceptions to this rule, as where the consignee calls for the goods and the carrier agrees or consents that he will hold them for him, thus making himself his agent to keep the goods (Richardson v. Goss, 3 B. & P. 127; Scott v. Petit, 3 B. & P. 469; Molloy v. Hay, 3 M. & R. 396; Rowe v. Pickford, 1 Moor. 526; Allan v. Gripper, 2 C. & J. 218); or where the consignee has been in the habit of using the warehouse of the carrier or wharfinger as his own (Tinker v. Humphrey, 4 Bing. 521; Foster v. Frampton, 6 B. & C. 109); or where the consignee claims the goods, and the carrier wrongfully refuses to deliver them, so that he makes himself liable for the goods in trover (Bird v. Brown, 4 Exch. 786; Walley v. Montgomery, 3 East, 585).

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[14] The statement of facts and part of the opinion are omitted.

But where the goods remain in the actual possession of the carrier, without fault on his part (Crawshay v. Eades, 4 B. & C. 181; Tucker v. Humphrey, 4 Bing. 516; Holst v. Pownal, 1 Esp. 240; Lackington v. Atherton, 8 Scott, N. S. 38); or in the hands of a depositary, or in the custom-house till the duties are paid (Mottram v. Heyer, 5 Denio [N. Y.] 629; Newhall v. Vargas, 13 Me. 109, 29 Am. Dec. 489; Northry v. Field, 2 Esp. 613); or until necessary papers are produced (Donath v. Broomhead, 7 Pa. 381); or while the vessel is lying at quarantine (Stoveld v. Hughes, 14 East, 308); there is no delivery, either actual or constructive. Goods cannot be said to have arrived at their final destination, so as to defeat the vendor's right of stoppage, while they remain in the hands of the wharfinger or carrier in that character, provided he is not the actual agent of the consignee beyond his duty as a mere wharfinger or carrier. Bertram v. Fairbrother, 1 M. & P. 528; Jackson v. Nichol, 5 Bing. N. C. 508; Atkins v. Colby, 20 N. H. 156.

There is no constructive possession on the part of the vendee, unless the relation in which the carrier stood before, as a mere instrument of conveyance to an appointed place of destination, has been altered by a contract between the vendee and the carrier, that the latter should hold or keep the goods, as the agent of the vendee. Foster v. Frampton, 6 B. & C. 107; Whitehead v. Anderson, 9 M. & W. 508.

In the present case there is no evidence of any such agreement. The consignees were in a great hurry, and complained that the goods were not delivered to them. They asked no agreement to keep the goods for them, and no assent was given to any such agreement. if we were to assume that the agents had authority to make any. The delivery check was no special agreement, and implied none, since it was but the usual mode of doing their business. The case comes not nearly up to Foster v. Frampton, 6 B. & C. 107, where it is said there is no proof of any such contract (to keep the goods). A promise by the captain of the vessel to the agent of the assignees is stated, but it is no more than a promise, without a new consideration, to fulfill the original contract, and deliver in due course to the consignee, on payment of freight, which leaves the captain in the same situation as before. After the agreement he remained a mere agent for expediting the cargo to its original destination.

A notice to the carrier not to deliver the goods is sufficient. It is not necessary that the vendor or his agent should demand a delivery of the goods to himself. Lett v. Cawley, 1 Taunt. 606; Whitehead v. Anderson, 9 M. & W. 518; Bell v. Moss, 5 Whart. (Pa.) 189.

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Judgment on the verdict.

## O'NEAL et al. v. DAY.

(St. Louis Court of Appeals, 1893. 53 Mo. App. 139.)

ROMBAUER, P. J. The defendant sheriff seized the goods in controversy by virtue of a writ of attachment, issued against the property of the Springfield Dry-Goods Clothing Company, at the instance of one of its creditors. The plaintiffs thereupon replevied the goods from the sheriff, claiming that they sold the goods to the attachment defendant on credit in New York City, to be delivered at Springfield, Missouri; that the transit of the goods had not terminated when they were attached, and that they exercised their right of stoppage in transitu by taking them from the sheriff on the writ of replevin. The trial of the cause resulted in a verdict for the plaintiffs, and the defendant now complains that this result was brought about by errors committed by the court in admitting incompetent evidence against him, and by erroneous views taken by the court of the applicatory law, as shown by its instructions.

The first point made arises in this manner: The defendant claims that the evidence admitted to show that the goods were sold by the plaintiffs to the attachment defendant was hearsay, and should have been rejected, and that, rejecting this evidence, no valid sale of the goods by the plaintiffs to the attachment defendant was shown. This argument loses sight of the fact that, if no sale were shown, the defendant would have no defense at all, as the prior ownership of the goods by the plaintiffs is conceded. In that event, the defendant would simply stand in the position of having levied a writ, directed against a third person, on the goods of the plaintiffs without any excuse whatever, and a judgment for plaintiffs would be a mere conclusion of law upon conceded facts. The objection, therefore, deserves no serious consideration.

In order to pass intelligently on the error complained of, touching the misdirection by instruction, a brief statement of the evidence of both parties is essential. Touching the following facts there is no controversy: The plaintiffs sold the goods to the attachment defendant on credit, believing that it was solvent, but, when the goods arrived at Springfield, the attachment defendant was insolvent, and the plaintiffs, learning of the fact, endeavored to stop the delivery of the goods before their transit ended. The only substantial controversy between the parties is whether the transit had actually ended when the goods were attached by the sheriff.

On that question the plaintiffs gave evidence tending to show that one Johnson was a private carrier or transfer man in Springfield, and had a standing order from the attachment defendant to bring all goods, consigned to it, from the railroad depots to its store; that Johnson had similar orders from other merchants, in fact was a transfer man for the public; that he had no special orders touching these goods, but paid the freight on them and intended to take them to the attachment defendant's store, simply because he found them at the railroad depot consigned to it; that his custom was to advance all freight charges, that is, pay them to the railroad agent when he took the goods, and collect such charges from the consignees, with his own charges superadded, when he delivered the freight to the consignees; that, according to his recollection, he did not take this box to the store, but took another box shipped by one Shoninger to the same consignee, and upon arrival at the store was told by the consignee that it would not receive any more goods, and thereupon he took the Shoninger box back to the railroad depot, and the railroad agent returned the freight charges to him.

Part of the evidence offered by the plaintiffs tended to show that Johnson took both boxes to the store of the attachment defendant, who refused to receive them on account of a recent fire in the store, and told Johnson to take them back to the depot. There was also some evidence for the plaintiffs, that the attachment defendant might have refused to receive the goods because their billing did not correspond to order, and that Johnson had no special authority from it to pay the freight charges on these goods.

The defendant gave evidence tending to show, in addition to the above facts, that Johnson had paid freight on the above goods and had receipted for both parcels before they were attached; that the freight charges were afterwards paid by the attaching creditors and for that reason were refunded to Johnson; that, when the attaching creditors paid the freight charges, they did not know that Johnson had paid them already; that, when the goods were attached, they were stored at the railroad warehouse.

This being in substance all the evidence bearing on the point in issue, the court declared the law as follows:

First. Upon the request of the plaintiffs: "That, before a delivery to an agent can be held to be a delivery to the buyer, such delivery must be to some one authorized to act in reference to the goods, otherwise than as a forwarder for the buyer, and that, if you find from the evidence in this case that M. M. Johnson was engaged in the transfer business in Springfield, Missouri, and was not in the employ of the said Springfield Dry-Goods & Clothing Company, and that the railroad companies doing business in Springfield, Missouri, and having depots for the reception and delivery of goods, were instructed by said Springfield Dry-Goods & Clothing Company to let Johnson have their freight, and he was to receive the goods to haul or transfer the same to said Springfield Dry-Goods & Clothing Company's place of business, and had no other authority, then a delivery of said goods to Johnson was not a delivery to the said Springfield Dry-Goods & Clothing Company."

Second. Upon the defendant's request: "The court declared the law to be that, if the court sitting as a jury finds from the evidence that plaintiff shipped the goods in question from New York, consigned to the Springfield Dry-Goods & Clothing Company at Springfield, Missouri, and, after their arrival at the Phelps Avenue depot, the consignee by its agent received the same and paid the freight, then hauled them to the storehouse or salesroom of said consignee, and the consignee directed their agents to return them to the depot, because they were not then in condition to receive them on account of a recent fire, having no place to put them, and they were thus and for this reason returned to said depot, and there received and held by the depot or railroad agent for the consignee, and while so held were attached in the suit of Hargadine & McKittrick Dry-Goods Company, then the issues must be found for the defendant."

Third. Of its own motion: "If the court finds from the evidence that the goods in question were consigned by the plaintiff to the Springfield Dry-Goods & Clothing Company at Springfield, Missouri, and that, after their arrival at the railroad depot at Springfield, they were receipted for and the freight paid by the consignee or its agent, the verdict must be for the defendant. But, in order to constitute an agent as above specified, the agency must be for some purpose other than forwarding goods to consignee's actual possession."

The law governing the vendor's right to stop the delivery of the goods while in transit is very simple, but its application to particular facts is often difficult; nor can the law as declared by the courts in individual cases be understood, unless the circumstances to which it is applied are critically examined. It may be stated as a general proposition that the right of the unpaid vendor to stop goods in transitu upon the bankruptcy or insolvency of the vendee, is not defeated by the mere arrival of the goods at their destination. The transitus is not at an end until they have come to the vendee's actual possession or his constructive possession by a delivery to his agent. If in the case at bar Johnson, the local carrier, was the agent of the attachment debtor, with full authority to receive and receipt for the goods, then upon the goods being delivered by the common carrier to Johnson, and upon his receipting for them, the transit was at an end. There is no pretense that the goods were to be delivered by the common carrier at the store, or at any other place but its depot, nor is there any pretense that Johnson, in receiving and receipting for the goods, acted as agent of the common carrier.

In White v. Mitchell, 38 Mich. 390, and in Inslee v. Lane, 57 N. H. 454, where a delivery to a local carrier under similar circumstances was held not to terminate the transit, the vendee had absconded before the arrival of the goods, and it was held that his absconding at once put an end to the local carrier's authority to receipt for him. In Mason v. Wilson, 43 Ark. 174, the vendee had notified the vendor before the arrival of the goods that he would not receive them on account of insolvency, which was held to terminate the authority of a local carrier to receive them for the vendee under a general authority to receive and receipt. The case of Macon & Western Ry. Co. v. Meador Bros., 65 Ga. 705, was decided under a clause of the Georgia code, which provides that the right of stoppage in transitu continues until the vendee obtains actual possession of the goods.

Neither of these cases cited by the respondent in support of his instruction has a tendency to vindicate the correctness of that instruction, and we must conclude that that instruction under the evidence in this case was incorrect and misleading, as was also the last sentence in the instruction given by the court of its own motion.

If Johnson, as the evidence tends to show, was the agent of the attachment defendant having general authority to receive and receipt for its goods, which arrived at the depots in Springfield, where such goods were deliverable, then Johnson's receiving the goods and receipting for them was prima facie a termination of their transit. If such general authority did not extend to this particular case, the onus of showing that fact rested with the plaintiffs. The plaintiffs might have shown that fact, either by showing that the attachment defendant refused to receive the goods owing to its insolvency, or that it refused to receive the goods because they were not properly billed, and in either event such evidence would have tended to show that the transit had not ended. But a refusal to receive the goods temporarily, on account of any inconvenience to place them in the store, had no tendency to show that their transit had not ended. Their return to the common carrier under such circumstances left them in the hands of the carrier as a warehouseman after the termination of the transit and subject to the dominion of the attachment debtor.

For error in the plaintiff's instruction the judgment must be reversed, and the cause remanded. All the judges concur.

## JOHNSON v. EVELETH.

(Supreme Judicial Court of Maine, 1899. 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.)

SAVAGE, J.[15] This case comes up on report. We think the evidence shows the following facts: On March 22, 1898, one Edward Ware entered into a contract of bargain and sale with the defendant for the purchase of about 1,000,000 feet of logs, numbering 7,663 sticks, then lying in Spencer Pond, above Moosehead Lake. It was agreed that the logs should be delivered by the defendant "over the dam" at the east outlet of Moosehead Lake into Kennebec waters. From that point they were to be driven down the Kennebec river by the

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[15] The statement of facts and part of the opinion are omitted.

Kennebec Log-Driving Company. Ware had booms in Fairfield and Winslow, and a mill at the latter place. The logs were bought by Ware for the purpose of being manufactured into lumber at his mill in Winslow. On May 25, 1898, Ware assigned to the plaintiff for the benefit of his creditors, under the provisions of the insolvent law. Laws 1897, c. 325, § 16. He was, and for a long time had been, hopelessly insolvent. In the meantime the defendant had caused a large portion of the logs to be delivered "over the dam" at the east outlet, and they were being driven down the Kennebec river towards Ware's booms and mill. Some scattering logs had already reached Ware's mill, and had been sawed. They had drifted down the river, without the necessity of being driven. But the drive proper did not reach Fairfield or Winslow until the last of August, 1898. When the drive reached Shawmut, above the Fairfield boom, August 22d, the defendant took from the river all the logs he had sold to Ware which then remained in the drive, numbering 6,815 sticks, and surveying 808,032 feet. And it is for this taking and alleged conversion that the plaintiff has brought this action of trover. Ware agreed to give four notes for the price of the logs, maturing at different times. At the time of his assignment he had given one note to the defendant, which was subsequently protested for nonpayment, and then tendered back by the defendant to the plaintiff. The other three notes he never gave.

The defendant asserts several grounds of defense, only one of which do we think it necessary to consider. He says he took the logs from the river in the exercise of the right of stoppage in transitu. He claims that the log-driving company was a carrier. He says he sold the logs on credit, and that while they were in transit to their ultimate destination in Winslow, and were in the possession of the log-driving company as a carrier, the purchaser became insolvent. And this fact, he says, gave him the right to resume the possession of the logs at any time before they came into the actual possession of Ware, or came to their destination in Winslow.

In reply the plaintiff says: (1) That the log-driving company was not a carrier, or middleman, in such a sense as gave it possession or control of the logs; that the river was the real carrier; that the company provided no means of conveyance or motive power, but simply facilitated the floating of logs down the river by breaking jams and otherwise, and hence that, after the logs passed out of the possession of the defendant by being turned "over the dam," they must have been, constructively at least, in the possession of Ware, while floating upon the river; and, furthermore, that in any event the log-driving company was really only an association of log owners, of whom Ware was one, and that a delivery of the logs to the company was, in effect, a delivery into the possession of Ware. (2) That by the terms of the contract between Ware and the defendant the "destination" of the logs was "over the dam" at the east outlet, and that when they were so delivered the "transitus" was at an end. And (3) that the facts that some of the logs had floated down the river to Ware's mill, and had been received and sawed by him, constituted a constructive delivery of the whole mass into his possession.

[The court here considered the character, duties, and method of operation of the log-driving company, and concluded that possession by the company was not possession by Ware.]

The next question in this connection is, may the right of stoppage in transitu attach to logs being driven as these were? We have no doubt that it may. It may be conceded that the log-driving company is not a common carrier, although in some respects its duties are analogous to those of common carriers (see Mann v. Booming Co., 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141, where the distinction is pointed out); but that is not decisive. When a vendor sends goods sold to the place of destination by private conveyance, the right of stoppage in transitu exists the same as if they are sent by common carrier. The vital question is, are they in transit between the vendor and the vendee? The right of stoppage in transitu is merely an extension of the lien for the price which the vendor has after contract of sale and before delivery of goods sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. Whether they are in the possession of a carrier, strictly so called, while in transit, or whether they are in possession of a "middleman," is immaterial. 2 Kent, Comm. 702.

In this case the logs were certainly in transit between the dam at the east outlet and Ware's mill. They were moving down the river. They were kept moving by the agency of the log-driving company. The company broke the jams, cleared the eddies and the banks of logs, took them wherever they became stranded, and drove in the rear. The company having assumed the duty of driving the logs, no one else had the right to interfere with the driving. So far as a mass of logs in a river is susceptible of possession, to that extent the log-driving company was in possession of these logs for the purpose of transporting them. And we think that was sufficient. It certainly accords with the equitable principles out of which the right of stoppage in transitu has grown. Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489. The character of the possession of the log-driving company is only important as it shows that the logs had not come into the possession of the vendee, and were still in transit.

But the plaintiff next contends that, so far as this case is concerned, the transitus ended when the logs were turned "over the dam" at the east outlet, because, he says, that was the ultimate destination of the logs, within the meaning of the contract of purchase; that the defendant's agreement was to deliver the logs there; and that, when the logs were so delivered, the transitus contemplated by the contract was at an end; and that in any further transit the right of stoppage in transitu would not exist. This might be true if by any fair construction of the contract, read in the light of surrounding conditions and circumstances, we could understand that the dam was really the contemplated final destination of the logs, or that the logs were to be delivered at the "dam," and there remain subject to further acts or directions of Ware. Becker v. Hallgarten, 86 N. Y. 167.

But we cannot interpret the contract so narrowly. We must view the situation as the parties did. We cannot shut our eyes to the fact that these logs, at the time of the contract, were above the dam, and above a portion of Moosehead Lake; that they were bought to be manufactured in Ware's mill in Winslow; that they must float or be driven down the river all the distance between those points; that it was expected that they would be driven by the log-driving company; that there was no place of deposit at the "dam" for keeping the logs, but that the transit in the lake above the dam and in the river below was actually continuous, the dam being simply the point where the defendant ceased to drive and the company began. In view of these circumstances, should "over the dam" be regarded as the "destination" of the logs? We think not.

The question here is not whether the turning of the logs "over the dam" was a delivery,—such a delivery as would have vested title in the vendee, in case delivery was necessary. It is not a question of title. We assume that Ware had the title to the logs. The defendant bases his right of stoppage in transitu upon that fact in part. The exercise of that particular right presupposes that the title of the goods is in the vendee; and, further, the title remains in the vendee even after the exercise of the right. The title is not changed. Hurd v. Bickford, 85 Me. 217, 27 Atl. 107, 35 Am. St. Rep. 353. The question here is whether, by the delivery at the dam, the logs came into the possession of the vendee, and so far only as the delivery at the dam throws light upon this question is it material. The distinction, in a word, is that property sold may have been delivered so as to affect title, and yet not have come into the possession of the vendee so as to bar the right of stoppage in transitu.

An illustration of this is found in the common class of contracts where the vendor agrees to deliver to a carrier designated by vendee for shipment to vendee's place of business. A delivery to a carrier under such circumstances vests title in the vendee, and places the goods subject to his risk, but the vendor does not lose his right of stoppage in transitu while the goods are in transit to the vendee. Grout v. Hill, 4 Gray (Mass.) 361; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Gibson v. Carruthers, 8 Mees. & W. 321. In a case where goods were delivered to the purchasing agent of the vendees to be transmitted to the vendees' factory in another state, it was held that the right of stoppage in transitu was not barred. The court said that the delivery of the goods was to the agent, not as owner, nor as agent of the owners to dispose of them in any other way than to transmit them to the vendees' place of business, and that to take away the right of stoppage in transitu there must be an absolute delivery to the agent for the use of the vendees, and it must have been a full and final delivery, as contradistinguished from a delivery to a person acting as a carrier or forwarding agent to the principal. Aguirre v. Parmelee, 22 Conn. 473. To terminate the transitus by delivery to a middleman, it must be a delivery not to transport, but to keep. Guilford v. Smith, 30 Vt. 49. See our own case of Newhall v. Vargas, supra. It was held in Mohr v. Railroad Co., 106 Mass. 67, that the transitus is not at an end until the goods have reached the place contemplated by the contract between the buyer and seller as the place of their destination.

As bearing upon the "destination" of the logs, the plaintiff, in argument, suggests that under the charter of the log-driving company the owner of the logs was required to file with the company a statement of their destination, which was not done, and also that the company does not itself take logs from the river, but the owners separate them from the general drive, and boom them, or take them out, at such points as they please. To these suggestions, it is a sufficient answer to say that it is clear that the intended destination of these logs was at Ware's mill, and that whatever the rights of Ware to stop the logs, or take them out of the river, may have been, he did not exercise them. He did not take possession of the logs while they were in transit.

Finally, the plaintiff contends, inasmuch as some small portion of the logs had floated town to Ware's mill, and had been received by him before his assignment, that this put him in constructive possession of the whole mass, and terminated the transitus. We are unable to come to that conclusion. The surveyor's bill shows that there were 7,663 sticks in the lot of logs purchased. The defendant, when he took possession, found 6,815 sticks in the drive. It appears that some had gone below Ware's mill to Hallowell, and undoubtedly some sticks had been left behind upon the banks or in the eddies of the river. But assuming that the whole of the remaining 848 sticks had, during the season, floated down to or by Ware's mill, still we do not think that that fact constituted a constructive possession in Ware, or the plaintiff, of the logs which had not come down. It is not like the case where a vendee has taken some portion out of the whole mass, which was then susceptible of possession, and in which case he has thus obtained constructive possession of the whole. Such facts are important sometimes when it is necessary to decide whether a legal delivery has been made. But here, as we have said, it is not a question of technical delivery, but one of actual possession. Here Ware took only such scattering, floating logs as came to him. The remainder were not in his possession. They were still in the possession of the log-driving company. They were still being driven. They were still in actual transit. And we think the vendor had the right to stop them before that transit was ended. Such a conclusion gives effect to the spirit and purpose of the law. Buckley v. Furniss, 17 Wend. (N. Y.) 504; Mohr v. Railroad Co., supra.

Plaintiff nonsuit.

## DIEM v. KOBLITZ et al.

(Supreme Court of Ohio, 1892. 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.)

Williams, C. J.[16] The contract of the parties, as shown by the pleadings, was one for the sale of goods on credit; the plaintiffs agreeing to give their commercial paper for the purchase price, payable at the times stipulated. As no time was specified in the contract for the delivery of the goods, the defendant's obligation was to deliver them when the plaintiffs gave their commercial paper, as they agreed to do, or within a reasonable time. The petition avers that the plaintiffs were at all times ready to perform their part of the contract, and that they requested performance by the defendant, which was by him refused. The answer denies these averments, and alleges that the plaintiffs became and were insolvent, and their commercial paper dishonored; and upon this information coming to the defendant, after part of the goods had been delivered to the carrier for shipment, he stopped them in transit, resumed possession, and afterwards resold them, with the other goods included in the contract, for the same price plaintiffs were to pay for them. The reply denies the insolvency of the plaintiffs, and avers that they accepted drafts drawn by defendant on them for the whole purchase price of the goods, payable in accordance with the contract.

The view which the court below took of the case was that the resale of the goods, as alleged in the answer, was a breach of the contract by the defendant, which gave the plaintiffs, notwithstanding their insolvency, an immediate right of action against him for damages. Hence, proof of the insolvency of the plaintiffs was excluded as immaterial, and the case was submitted to the jury as involving no inquiry except the amount of the plaintiffs' damages.

We do not understand it to be claimed that the defendant, upon learning of the plaintiffs' insolvency, might not lawfully retake the goods while they were yet in the custody of the carrier, nor that he was bound to deliver any part of the goods so long as the insolvency of the plaintiffs continued. The claim is that the right of the vendor in such case is simply to retain possession of the property until the purchase price is paid, and therefore a resale by him before the expiration of the credit puts it out of his power to deliver to the first vendee, and so constitutes a breach of the contract with him, for which he may, though insolvent, maintain a special action for damages. Whether this claim is correct or not is the principal question in the case.

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[16] The statement of facts is omitted.

The right of stoppage in transitu is the right of the vendor to resume possession of the goods sold, while they are in transit to the vendee, who is insolvent or in embarrassed circumstances. Actual insolvency of the vendee is not essential. It is sufficient if, before the stoppage in transitu, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary, apparent evidences of insolvency.[17] Nor is the vendor's right abridged or in any way affected by the fact that he has received the vendee's bills of exchange or other negotiable securities for the whole price, even though they have been negotiated, and are still outstanding. It seems to be well settled that when the right of stoppage in transitu is properly exercised the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property, and they may be enforced in the same way. His right to intercept the goods before they reach the hands of the vendee, and his right to withhold those still in his possession, rest upon the same just principle, that the insolvent vendee cannot require the vendor to deliver the goods or perform the contract when he himself is unable to pay for them or perform the contract on his part.

To require the goods to be delivered to such vendee would simply result in the application of the property of one man to the payment of another man's debts. The right of the unpaid vendor with respect to the goods is sometimes called a "lien;" and it is a lien, in the sense that the vendee, upon payment or tender of the price, but not otherwise, may recover them. But it is something more than a mere common-law lien, which is only a naked right of possession. With the goods in his possession, the vendor has a special property in them, which is parcel of his original ownership. Whether the effect of the stoppage in transitu, or the retention of the goods by the vendor, on the discovery of the vendee's insolvency, is to rescind the contract, or not, has been the subject of much discussion; and some authors say the question is not yet definitely settled.

But the prevailing opinion now is, we believe, that the contract is not necessarily rescinded, unless the parties by their conduct so treat it, that conclusion is most favorable to the vendor, for whose protection the doctrine of stoppage in transitu was first established; for, if the exercise of the right operated to rescind the contract, the vendor would be deprived of the remedy which it is now generally conceded he has, in a proper case, upon a resale of the goods, to hold the vendee or the assignee of his estate for the loss sustained through his nonperformance of the contract, or in consequence of a fall in the market price. And as the stoppage does not rescind the contract of sale, it follows that the vendee or his assignee may obtain the goods on payment of the price, or, if the vendee was able and ready to perform the contract on his part, he may recover damages for the failure of the seller to deliver the property according to its terms. But can the vendee maintain such action if he is not able to perform? And does his insolvency at the time fixed for the delivery of the property amount to such inability? Or, where the sale is upon credit, does a resale of the property by the vendor before the expiration of the time of the credit give the insolvent vendee, notwithstanding his inability to pay for the goods, a right of action against the vendor for the difference between the contract price and their market value at the time of the resale?

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[17] For definition of insolvency, see Sales Act, § 76 (3). It was held, in Rogers v. Thomas, 20 Conn. 53 (1849), that if the buyer was insolvent at the time of the sale the seller has no right to stop the goods. This is obviously just if the seller knew of the buyer's insolvency at the time of the sale; but without this qualification the rule is opposed to both reason and authority. See Benedict v. Schaettle, 12 Ohio St. 515 (1861), and other cases cited in Williston, Sales, § 522.

As an authority sustaining the right of the vendee to maintain such an action against his vendor, Bloxam v. Sanders, 4 Barn. & C. 941, is cited, where Bailey, J., says: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute. It is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, for his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in transitu, a fortiori is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act upon the right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sells when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights."

Still the question remains, when is the resale wrongful? And what is necessary on the part of the vendee to enable him to maintain the action for the resale was not decided, nor does it appear to have been a question in that case. The action was trover, to the maintenance of which the right of possession was essential. In Smith's Leading Cases, (volume 1, pt. 2, p. 1199), in the note to Lickbarrow v. Mason, 2 Term R. 63, it is said: "Supposing the contract of sale not to be rescinded, it seems to follow that the goods, while detained, remain at the risk of the vendee, and that the vendor can have no right to resell them, at all events until the period of credit is expired. After that period, indeed, the refusal of the vendee or his representatives to receive the goods and pay the price would probably be held to entitle the vendor to elect to rescind the contract."

The only authority cited in support of the note above quoted is the case of Langfort v. Tiler, Salk. 113, from an examination of which it will be seen that it does not meet the question. The full report of the case, which is very brief, is as follows:

"The defendant, who was administratrix to her late husband, used to deal in tea in his life-time, and bought four tubs of the plaintiff at so much per tub, one of which she paid for and took away, leaving £50 in earnest for the other three; and Holt, Chief Justice, ruled: (1) That the husband was liable upon the wife's contract, because they cohabited. (2) That, notwithstanding the earnest, the money must be paid upon the fetching away the goods, because no other time for payment is appointed. (3) That earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void. (4) That, after earnest given, the vendor cannot sell the goods to another without a default in the vendee; and therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then, if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person."

The sale, it appears, was not on credit, nor was the purchaser insolvent; nor does the case hold that the vendor would be liable in damages for a resale of the goods, without a request made of the vendee to receive and pay for them, if at the time he was not ready and able to pay the purchase price. On the contrary, the action was by the vendor against the vendee, who was the administratrix of her husband's estate, to charge the estate with her contract of purchase, and Lord Holt was speaking of what was necessary to be done by the vendor to enable him to sue for the vendee's breach in not making full payment. The holding that, to entitle the seller to sue, he must offer to perform and request performance by the purchaser, is in accordance with the now generally recognized rule on the subject.

The general rule is that in contracts of bargain and sale, where there is no agreement for credit, the promise of the vendor to sell and deliver the property, and that of the purchaser to pay the contract price, are mutually dependent, and neither party is bound to perform without contemporaneous performance by the other. Payment or tender of the price is the condition upon which the purchaser can require delivery of the property; and delivery or tender by the seller is just as essential on his part if he would sue for the price, or for damages for its non-payment. If both parties are unable to perform, neither can maintain an action against the other; and therefore, while it is necessary for the vendor, if he would sue, to offer performance on his part, he is in a position to defend without doing so, if the vendee is not able to perform. In Reader v. Knatchbull, 5 Term R. 218, an application was made of the rule which is much in point. The plaintiff declared upon an agreement by the defendant to deliver to him a quantity of Manchester cottons. The defense was that after the making of the contract the plaintiff had compounded with his creditors. Mr. Justice Buller directed the jury "that, if they believed the plaintiff was really in such a situation as to be unable to pay for the goods, that was a good defense in point of law to the action; and the jury accordingly found a verdict for the defendant."

When the sale is upon credit, it is one of the implied conditions of the contract that the vendee shall keep his credit good; his promise to pay at a future day involving an engagement on his part that he will remain and then be able to pay, which engagement is broken when he becomes insolvent and unable to pay; and hence the right of the vendor to then stop performance of the contract on his part. Nor is the rule varied by the fact that the vendee has given his notes or bills or other securities for the price, payable at the end of the time for which the credit is allowed. The vendor, in such case, incurs no liability by not delivering the property, unless the vendee pay or tender the contract price. But, in order to sue the vendee, he should offer to deliver according to the contract. Such is the scope of the rule laid down in Mining Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424, where it is held: The insolvency of the vendee in a contract for the sale and future delivery of personal property in installments, payment to be made in notes of the vendee as each installment is delivered, 'is sufficient to justify the vendor for refusing to continue the delivery, unless payment be made in cash;' but it does not absolve him from offering to deliver the property in performance of the contract, if he intends to hold the purchasing party to it. He cannot insist upon damages for non-performance by the insolvent without showing performance on his own part, or an offer to perform, with ability to make the offer good.

The rule must work both ways. The rights and obligations of the vendor and vendee are correlative. If the insolvency of the vendee is sufficient to justify the vendor in refusing to deliver the property unless payment be made in cash, it follows that the vendor incurs no liability by his refusal, and therefore no right of action accrues to the vendee, unless payment be made by him; and if the vendor cannot insist upon damages for the vendee's non-performance without showing an offer on his part, with the ability, to perform, so neither can the vendee, if he is without the ability to perform, recover from the vendor. The observations of Gholson, J., in Benedict v. Schaettle, 12 Ohio St. 520, 521, are in point, and are in harmony with this view of the subject. He says: "If the true principle of the right of stoppage in transitu be found in that certainly just rule of mutual contract by which either party may withhold performance on the other becoming unable to perform on his part; if the foundation of the rule be a just lien on the goods for the price until delivered,—an equitable lien adopted for the purposes of substantial justice,—then it is the ability to perform the contract, to pay the price, which is the material consideration. If there be a want of ability, it can make no difference, in justice or good sense, whether it was produced by causes or shown by acts at a period before or after the contract of sale. Substantially to the vendor who is about to complete delivery, and abandon or lose his proprietary lien, the question is, can the vendee perform the contract on his part? has he, from insolvency, become unable to pay the price?" And in another part of the opinion he further says: "The rights of a fair vendee will be sufficiently protected by giving him an indemnity when the right of stoppage in transitu is exercised upon rumor or suspicion without any foundation in fact, and by depriving the vendor, in all cases, of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the vendee or his assignee on the payment or tender of the agreed price."

But it is contended that, while the vendor may refuse to deliver the property to the insolvent vendee, he is obliged to keep it for the vendee until the time of the credit expires, and if he resell before that time the vendor may have his action for damages. When, by the contract, the property is to be delivered at a future day, and the vendor sells it to another before that time arrives, the vendee, being able to perform, may have an immediate action; for the vendor, by thus disabling himself from performing by delivery at the proper time, commits a breach of the contract, and the vendee need not wait until the time for the delivery arrives. But that rule has no application here. The obligation of the vendor, under a contract like that between the parties in this case, is to deliver the goods at the time stipulated in the agreement, which is at once, upon the receipt or tender of the purchaser's commercial paper, or within a reasonable time,—not at the time to which the credit is extended. The right of the vendee, is to receive the goods at the time the vendor contracts to deliver them, and he is not bound to receive them at any other time. The breach, therefore, on the part of the vendor, if there be one, consists in his failure to deliver the goods according to the contract, and occurs at that time, and not upon a resale subsequently made; and the vendee's cause of action arises, if at all, upon the failure to deliver, and not on the resale.

In the case now before us the averments of the defendant's answer, which on the trial he was not permitted to prove, though he offered to do so, show that at the time the goods were to have been delivered, according to the contract of sale, the plaintiffs were insolvent and their paper dishonored, so that the condition upon which their right to the goods depended had not been performed by them, and they were without the necessary ability to perform the same. Upon what just principle can the seller, in such a case, be required to hold the goods until the expiration of the credit? It is true that at that time the vendee may again be solvent, and able to pay. There is no presumption or assurance that he will. If any presumption arises, it is rather that the insolvency will continue, which is more in accordance with the experience of the commercial world. But, as we have seen, it is part of the vendee's engagement that he will maintain his credit, which is broken by his insolvency. And it would be unjust to require the vendor to sustain the loss resulting from the destruction or deterioration of the goods in the mean time, which in many instances must ensue if the seller is compelled to keep the goods shut up, and take the risks of the future solvency of the buyer.

The injustice of such a requirement is conceded where the goods are of a perishable nature; and the vendor, it is now settled, is not obliged to keep goods of that character until the termination of the credit. In the notes to Lickbarrow v. Mason, in Smith's Leading Cases, (volume 1, pt. 2, p. 1199), it is said: "But what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep them until the time of credit has expired? In such a case it is submitted that courts of law, having originally adopted this doctrine of stoppage in transitu from equity, would act on equitable principles by holding the vendor invested with an implied authority to make the necessary sale."

It is insisted, however, that the right of sale in such cases constitutes an exception to the rule. In our opinion the reasons upon which the exception rests, if it be such, should make the exception the general rule. The value of many kinds of merchandise, not perishable, depends largely upon their being in the market at the appropriate seasons, and to supply temporary demands; and, if not available for those purposes at the proper time, they become comparatively worthless, or so reduced in value as to entail great loss, which may be less only in degree, though greater in amount, than where the goods are perishable; and it is no more just or equitable to subject the vendor to the loss in the one case than in the other. The right of resale ought not, we think, be made to depend upon the degree or extent of the loss that must ensue if it should be denied. It rests upon a different principle, and grows out of the failure of the vendee to keep his engagement. Not that the contract is thereby rescinded, for that would defeat the vendor's remedy for damages upon resale after due notice, but that he may elect to treat the agreement for the credit as at an end, on account of the vendee's default. We see no good reason for holding that the rights of the seller are any the less where the sale is upon credit, and the property is retained by him on account of the buyer's insolvency, than they would be if the sale were for cash, and the vendee was unable to pay the price agreed upon. In either case the incapacity of the vendee to perform his part of the agreement—and insolvency is incapacity—warrants the vendor in withholding performance on his part.

We are therefore of opinion the trial court erred in excluding the evidence of the plaintiffs' insolvency, and in charging the jury as shown in the statement of the case, and also in refusing the instruction requested by the defendant therein contained. Counsel have argued a question relating to the charge of the court on the measure of damages; but, as no exception was taken to the charge on that subject, it will not be further noticed.

For the errors mentioned above, the judgments below are reversed, and the cause remanded for further proceedings.

## SECTION 3.—RESALE AND RESCISSION

### MARTINDALE v. SMITH.

(Court of Queen's Bench, 1841. 1 Q. B. 389.)

Trover for goods and chattels, to wit, six stacks of oats, etc., of which plaintiff was lawfully possessed as of his own property. Pleas: 1. Not guilty. 2. That plaintiff was not possessed of the goods and chattels as of his own property, in manner and form, etc. Issues thereon.

On the trial, before Alderson B., at the Cumberland spring assizes, 1839, it appeared that defendant, being owner of six stacks of oats then standing on his ground, sold them to the plaintiff, under the following written contract.

"April 23d, 1838. Sold to Mr. John Martindale of Catterlen six oat stacks, for £85.

"John Smith gives John Martindale liberty to let the stacks stand, if he thinks fit, until the middle of August next; and John Martindale to pay John Smith for the stacks in twelve weeks from the date hereof."

Signed by the parties.

In the beginning of July, the defendant told the plaintiff that, if he, plaintiff, did not pay on the 16th of that month, defendant would consider the contract at an end. The plaintiff did not pay on that day, but afterwards requested time, which the defendant refused to give, adding that plaintiff, as he had failed in payment at the time appointed by the contract, should not have the stacks. Two or three days afterwards, the plaintiff tendered the money; which the defendant refused to accept. On the 14th of August, the plaintiff served defendant with a written notice, in which he repeated the tender, and stated that he should attend to remove the stacks on the next day at ten in the morning, and demanded that he should be then admitted to the field in which the stacks were, requiring the defendant not to sell them. An actual tender was then again made, and refused: and defendant afterwards sold the stacks.

The defendant's counsel contended that plaintiff, having made default in payment at the appointed day, was not entitled to the possession. The learned judge directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendant on the second issue.

Lord DENMAN, C. J., now delivered the judgment of the court. After stating the facts, his lordship proceeded as follows:

Having taken time to consider of our judgment, owing to the doubts excited by a most ingenious argument, whether the vendor had not a right to treat the sale as at an end and reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract. Such is the doctrine cited by Holroyd, J., from Com. Dig. Agreement, (B. 3.), in Tarling v. Baxter, 6 B. & C. 360, 362; and it will be found consistent with all the numerous cases referred to in the course of the argument. In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement, than which nothing can be more easy, by introducing conditional words into the bargain. The late case of Stead v. Dawber, 10 A. & E. 57, does not apply, depending (as Parke, B. truly observed in Marshall v. Lynn, 6 M. & W. 117); not on the materiality of the alteration in the contract, but on the fact of the alteration only.

Pothier, in his Traite du contrat de vende, part. V. ch. 2, § 6, art. 475 (Oeuvres, tome 1, p. 640, 2d Ed.), cites the Civil Code for the proposition, that a purchaser's delay in paying the price does not give the vendor a right to require a dissolution of the contract; he can only exact by legal procedure the payment of the price due to him. "Non ex eo, quod emptor non satis conventioni fecit, contractus irritus constituitur." Cod. lib. iv. tit. 44, § 14. He adds, however, that, from the difficulty of enforcing payment from debtors, the French law had departed from the rigour of these principles, permitting a suit for the dissolution of the contract for default of payment. The judge then appointed a more distant day; which passed, and no payment made, the vendor was permitted to resume possession of the thing sold. But, even after sentence of dissolution. the purchaser may prevent that effect, and keep what he has bought, by appealing, and offering, on that appeal, the price which he owes, with interest and expenses.

The vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain. And here the lien was gone by tender of the price. My brother Alderson directed the jury according to these principles: and the rule for setting aside the verdict must be discharged.

Rule discharged.[18]

## DUSTAN v. McANDREW et al.

(Commission of Appeals of New York, 1870. 44 N. Y. 72.)

Appeal from an order of the General Term of the Superior Court of the city of New York, made upon exceptions therein heard in the first instance, directing judgment for the plaintiff upon a verdict rendered at a trial term of that court.

On the 24th of August, 1860, J. S. & W. Brown, of the city of

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[18] In the earlier case of Maclean v. Dunn, 4 Bing. 722 (1828), Best, C. J., said: "It is admitted that perishable articles may be resold. It is difficult to say what may be esteemed perishable articles, and what not; but if articles are not perishable, price is, and may alter in a few days, or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it, except on the authority of decided cases." For a summary of the results of the English cases, see Benjamin, Sales (5th Eng. Ed.) p. 949.

New York, executed an agreement with the plaintiff to sell him 100,000 pounds of hops, as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we have sold this day to Mr. John F. Dustan, of this city, 100,000 pounds of first sort western or eastern hops, as we may select; growth of 1860; deliverable in the city of New York, at our option, during the months of October or November, 1860, at seventeen cents per pound, subject to Mr. J. S. Brown's inspection, or other mutually satisfactory. Terms, cash on delivery. Mr. Dustan's name to be made satisfactory either by indorsement or by a deposit of $2,500 by both parties.

"J. S. & W. Brown."

On the 7th of September the plaintiff sold this contract to the defendants, by an instrument of which the following is a copy:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I have this day sold to McAndrew & Wann the contract of J. S. & W. Brown, dated 24th August, 1860, for 100,000 pounds first sort hops, western or eastern, growth of 1860; upon condition that the said McAndrew & Wann fulfill the conditions of said contract to the said J. S. & W. Brown, and pay to me, in addition, on delivery of the hops, ten and one-half cents per pound. John F. Dustan.

"New York, September 7, 1860."

On the 28th day of November, J. S. & W. Brown notified the plaintiff by letter, that they would deliver the hops pursuant to contract on the 30th of that month; and plaintiff immediately, on the same day, notified the defendants of that fact, inclosing to them the letter of J. S. & W. Brown; and on the same day the said J. S. & W. Brown wrote a similar letter to the defendants. These notices actually came to the hands of the defendants on the morning of the 30th.

Prior to November 30, John S. Brown had inspected the hops, and put his brand upon them, and certified that they were such hops as the contract called for. On the 30th of November, J. S. & W. Brown were ready and willing to deliver the hops, and the defendants were requested to take them, and they declined on the sole ground, as they claimed, that they had not had an opportunity to examine them and inspect their quality, and because Messrs. Brown had refused to let an inspector, whom they sent, inspect the hops.

On the 24th of December the plaintiff took the hops from Messrs. Brown and paid for them, and on the same day wrote the following letter to defendants:

"New York, December 24th, 1860.

"Messrs. McAndrew & Wann—Gentlemen: The 100,000 pounds hops mentioned in contract of J. S. & W. Brown with me, of 24th

August, 1860, and in contract of yourselves with me of 7th September, 1860, are now at the store No. 4 Bridge street, awaiting the fulfillment by you of the terms of your contract, and I hereby tender to you the said hops, and demand from you the payment of the sum of $27,500, the amount of such contract price. Unless you comply with the terms of said contract, on or before the 26th day of December, instant, I will proceed to sell the same on your account and hold you for any deficiency.

"Your obedient servant, John F. Dustan."

Defendants still declined to take the hops, and then on the 26th day of December plaintiff placed them in the hands of a hop broker, who sold them for twenty cents per pound, which sale was conceded on the trial by the defendants, to have been fairly made.

This suit was commenced for the breach of the contract to the part of the defendants, in not taking the hops according to contract. It was tried in the Superior Court of New York, before the court and a jury. On the trial the foregoing facts appeared, and the plaintiff also gave evidence tending to show, that on the 30th day of November, and on the 26th day of December, twenty cents per pound was the fair market value of the hops; and the defendants gave evidence tending to show, that on both of these days the market value was some cents higher.

There was also evidence showing that hops had a downward tendency in market all through the month of December. It was shown, also, and not disputed, that the hops in all respects answered the contract.

After the evidence was closed the presiding judge stated, that it was his opinion that there was no question for the jury, and that the plaintiff was entitled to recover the difference between the contract price and the price he obtained on the resale.

The counsel for defendants requested the court to submit the facts to the jury, and to charge the jury in such form as to raise the questions discussed in the following opinion, and to the refusal of the court, defendant's counsel excepted.

The jury, under the direction of the court, rendered a verdict in favor of plaintiff for $8,130. The court directed the exceptions to be heard in the first instance at the General Term; and the General Term having denied a new trial, and ordered judgment for plaintiff, the defendants appealed to this court.

Earl, C.[19] * * * By the purchase of the contract the defendants were substituted, as to its performance, in the place of the vendee therein named, and were bound to do all that he had agreed to do or was bound in law to do. When notified that the hops were ready for delivery they declined to take them, upon the sole ground that they had not had an opportunity to examine or inspect them; and they claimed that they had sent one Smith to inspect them, and that he had been declined permission to inspect them. There was no proof however that they ever tried to examine or inspect the hops, or that the vendors ever refused to permit them to examine or inspect them. They sent Smith to inspect them, and he went to one of the several storehouses where some of the hops were stored, and he says he was there refused an opportunity to inspect them by Mr. A. A. Brown. But there is no proof that he was in any way connected with the vendor, or that he had any agency or authority whatever from them. There was no proof that defendants ever tried with the vendors to agree upon any other inspector, or that they ever asked the vendors to have the hops inspected by any other inspector, and they made no complaint at any time that they were inspected without notice to them. The point that they should have had notice of the inspection was not taken in the motion for a nonsuit, nor in any of the requests to the court to charge the jury. If the point had been taken in the answer or on the trial, the plaintiff might perhaps have shown that notice was given by the vendors, or that it was waived.

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[19] Part of the opinion is omitted.

Hence we must hold, upon the case as presented to us, that there was no default on the part of the plaintiff or the vendors, and that the defendants were in default in not taking and paying for the hops. The only other question to be considered is, whether the court erred in the rule of damages adopted in ordering the verdict.

The court decided that the plaintiff was entitled to recover the difference between the contract price and the price obtained by the plaintiff upon the resale of the hops, and refused, upon the request of the defendants, to submit to the jury the question as to the market value of the hops on or about the 30th day of November.

The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase-price; (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price. 2 Pars. Cont. 484; Sedgw. Dam. 282; Lewis v. Greider, 49 Barb. 606; Pollen v. Le Roy, 30 N. Y. 549. In this case the plaintiff chose and the court applied the second rule above mentioned. In such case the vendor is treated as the agent of the vendee to make the sale, and all that is required of him is that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence. Here it is conceded that the sale was fairly made; it was made in the city of New York, in less than one month from the time the defendants refused to take the hops. It was not claimed on the trial that the delay was unreasonable, and we can find nothing in the case to authorize us to hold that it was unjustifiable. We are therefore of the opinion that the court did not err as to the rule of damages.

The judgment should therefore be affirmed, with costs.

For affirmance: LOTT, C. C.; EARL and HUNT, CC. GRAY, C., was for reversal, on the ground that the delay in selling was too great. LEONARD, C., did not vote.

Judgment affirmed, with costs.[20]

## ACKERMAN v. RUBENS.

(Court of Appeals of New York, 1901. 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728.)

On the 28th of July, 1897, at the city of New York, the plaintiff sold his yacht Iola to the defendant for the sum of $2,250, by an executory contract which impliedly provided that the title should not pass until the purchase price should have been fully paid. The defendant refused to complete his purchase, whereupon the plaintiff gave him written notice that he should sell the yacht "either by public sale at auction, or private negotiation, whichever in my judgment will result in obtaining the most favorable price, and in the event of any deficiency in the sum so obtained and the contract price as agreed upon as per contract of July 28th, 1897, namely, $2,250, I shall hold you for such deficiency." The defendant paid no attention to this notice, and had no further communication with the plaintiff at any time on the subject of selling the yacht.

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[20] In Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692 (1898) Martin, J., said: "It is to be observed that in many of the cases cited it has been said that in thus selling the property the vendor acts as the agent of the vendee for that purpose. Clearly, the use of the words 'as agent of the vendee' was not intended as a determination that the relation between the parties was that which ordinarily exists between a principal who owns property and an agent who may be authorized to manage or sell it. But it is a general expression which has been somewhat inaccurately used to define the right of a vendor to make a resale and hold the vendee responsible for his loss. It is quite manifest that a resale made under such circumstances is not made by the vendor strictly as the agent of the vendee, but he acts for himself in disposing of the property for the purpose of ascertaining the actual damages he may sustain. Doubtless in making it the vendor would be bound to sell within a reasonable time, to exercise good faith to effect a sale at the best price he could obtain, to follow any proper instructions the vendee might give as to the time and manner in which it should be made, and to give credit upon the contract price for the amount received. His duties in making the sale may, in some respects, resemble those of an agent, and thus the expression that he acts 'as the agent of the vendee' has arisen. That he owes the vendee the duty to thus conduct the sale is clear, but that his acts in making it can be properly regarded as the acts of an agent, as that word is generally understood, is quite otherwise. Surely the fact that a vendor might seek this remedy against an insolvent or doubtful vendee, would not confer upon the latter such a title as would enable him to demand and hold the property without complying with the terms of the contract. To say then that the vendor becomes the agent of the vendee in making the sale is not quite correct, and is to be regarded at most as a mere fiction of law, and the beneficial title does not pass to the vendee."

The plaintiff promptly placed the vessel in the hands of an experienced yachtsman for sale, but after due effort no sale could be made, although she was advertised in a prominent New York daily newspaper every Sunday during the months of August and September. Thereupon the plaintiff placed her in the hands of a public auctioneer for sale at auction, and on the 29th of September gave the defendant personal notice in writing that she would be sold at auction on the 6th of October, 1897, at 1 o'clock p. m., at the store of the auctioneer, No. 29 Burling Slip, in the city of New York. In the advertisement of the auctioneer she was fully and accurately described, and notice was given that she could be "seen at Atlantic Yacht Club Basin, foot of 55th street, Brooklyn." At the time and place named she was sold at auction in the usual way to an agent of the plaintiff for $1,100, which was the highest, but not the only, bid, as a stranger had run her up to $1,050. The expenses of the sale were $90, of which $40 was for advertising, handbills, and postage, and $50 was for the services of the auctioneer.

The plaintiff credited the net proceeds of the sale upon the purchase price, and sued the defendant for the balance, amounting to $1,240. The defendant, in his answer, pleaded a general denial, and also that he was induced to purchase the yacht by certain fraudulent representations made by the plaintiff as to her condition, but on the trial he gave no evidence in support of that allegation or any other. When the plaintiff rested, after proving the foregoing facts, the trial court, upon motion of the defendant, directed a verdict for the plaintiff for nominal damages only, and an exception was duly taken. The jury rendered a verdict for six cents, and, the judgment entered accordingly having been affirmed by the appellate division, the plaintiff came here.

Vann, J. When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him, and sue for the entire purchase price; or he may keep the property as his own, and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get, and, after crediting the net amount received, sue for the balance of the purchase money. Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692; Dustan v. McAndrew, 44 N. Y. 72.

While the courts below recognized this rule, they did not apply it; for they held that the sale at auction was no sale at all, because a man cannot sell to himself. This would be true of an attempt to make a private sale to one's self, but it is not true of a sale at public auction, fairly conducted by a licensed auctioneer, and made at a reasonable time and place, after adequate opportunity to see the property, due advertisement to the public, and personal notice to the vendee, when the real purpose is to ascertain the value of the property. The law is satisfied with a fair sale, made in good faith, according to established business methods, with no attempt to take advantage of the vendee. Such, as the jury might have found, was the sale under consideration. The primary object of the sale was not to pass title from the vendor, but to lessen the loss of the vendee. The subject of the sale had no market value, and the amount for which it could be sold depended largely upon taste and fancy. A public competitive sale by outcry to the highest bidder, duly advertised and made upon notice to the vendee, is a safer method of measuring the damages than a sale by private negotiation, which has been held sufficient. Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415. A fair public sale, in the absence of other evidence, is competent evidence of value.

The plaintiff did not conduct the sale himself, but placed the yacht in the hands of a public auctioneer for sale, without reservation, on account of whom it might concern. While the auctioneer was his agent, he could not lawfully control him so as to prevent an honest sale. The defendant had notice and an opportunity to protect himself, yet he asked for no postponement, made no request, gave no instructions, and did not even appear at the sale. If the plaintiff's agent had refrained from bidding, the property would have gone to a stranger for a less sum than it finally brought, and yet in that event even, according to the defendant's theory, the sale would have been valid. The fact that the plaintiff outbid all competitors did not render the sale invalid; for he had a right to bid, provided he took no advantage by trying to prevent others from bidding, or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale, the action of the trial court in virtually withdrawing the case from the jury might have been justified; but the mere fact that he was the highest bidder at a public sale, the fairness of which is not questioned in any other respect, did not warrant the direction for nominal damages only. The object of the sale was to measure the damages caused by the default of the defendant, and they were diminished, instead of being increased, by the action of the plaintiff.

We forbear further discussion, because the question is no longer open in this court, as it was involved in a case recently decided by us upon careful consideration after full discussion by counsel. Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692. In that case, as in this, the property was sold at auction to a representative of the vendor, and the point was distinctly made on the argument before us that as the vendor was the real purchaser, "the sale was colorable only, and absolutely without effect upon the rights of the parties." While we did not discuss the question in our opinion, it was necessarily involved, was passed upon in consultation, and decided. Both upon principle and authority we think that the amount for which the yacht was struck off to the vendor at an auction sale fairly conducted, upon notice to the vendee, with no suspicion of fraud or undue advantage, was lawful evidence of the value of the yacht, and presented a case for the consideration of the jury.

The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

HAIGHT, J. (dissenting).[21] The rule of damages for a breach by the buyer of a contract for the sale of personal property is well settled. The seller may store the property for the buyer, and sue for the purchase price; or may sell the property as agent for the vendee, and recover any deficiency resulting; or may keep the property as his own, and recover the difference between the contract price and the market value at the time and place of delivery. If he sells as agent, he may sell either at public or private sale; but it must be a sale made in good faith, and in such manner as to produce most nearly the full value of the property. Selling as agent, he cannot sell to himself. Selling involves contracting, and a person cannot contract with himself and bind others thereby. If he could sell to himself publicly, he could privately, and thus be able to perpetrate a fraud or an injustice which might be difficult to detect or prove. Van Brocklen v. Smeallie, 140 N. Y. 70, 75, 35 N. E. 415; Pollen v. Le Roy, 30 N. Y. 549, 557; Dustan v. McAndrew, 44 N. Y. 78; Hayden v. Demets, 53 N. Y. 426; Bain v. Brown, 56 N. Y. 285. * * *

I think the judgment should be affirmed.

PARKER, C. J., and BARTLETT and MARTIN, JJ., concur with VANN, J. GRAY and WERNER, JJ., concur with HAIGHT, J.

Judgment reversed, etc.

## PRATT v. S. FREEMAN & SONS MFG. CO.

(Supreme Court of Wisconsin, 1902. 115 Wis. 648, 92 N. W. 368.)

The complaint was to the following effect: February 16, 1900, the Central Navigation & Construction Company of the state of Oregon, contracted with defendant, of the city of Racine, Wisconsin, for a steam boiler to be manufactured and delivered to such company by May 1st, following, for the sum of $6,000, one third being paid at the date of the contract and the balance to be paid one half at the time of the delivery of the boiler and the other in thirty days thereafter. In November, 1900, defendant being in default as to the delivery of the boiler but having it ready therefor, refused the navigation company's demand for the privilege to inspect it preliminary to shipment, said company offering at the time of such demand to pay the balance due therefor. Subsequent to the date last mentioned, defendant sold the boiler to other parties, pretending to have rescinded the contract with the navigation company. November 20, 1900, and before this action was commenced, such company, for value, assigned its right to recover the down-payment of $2,000 to plaintiff. December 6, 1900, plaintiff notified defendant of such assignment and demanded payment of said sum with interest from the time the same came to his hands, which demand was refused. Judgment was asked for $2,000 with interest and costs.

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[21] Part of the dissenting opinion is omitted.

Defendant answered admitting the making of the contract as alleged, and the completion of the boiler for shipment, but alleged that prior to such completion the navigation company became insolvent; that defendant then exercised its right to hold the boiler for full payment of the purchase money, duly notifying said company of its attitude in the matter; that thereafter, the navigation company having neglected to pay for the property, defendant exercised its legal right to sell the same for the account of such company, realizing $150 over and above the amount due, which, before the commencement of this action, was tendered to plaintiff, who refused to accept the same.

The evidence upon the trial was to the effect that the breach of contract by defendant, in failing to complete the boiler for shipment May 1, 1900, was waived; that the navigation company, before the boiler was ready for shipment, became insolvent and was notified that by reason thereof the boiler would not be shipped in advance of full payment therefor; that the boiler was such that there were very few customers for it; that defendant sold it, as alleged in the answer, because of the vendee's insolvency and its neglect to take and pay for the property as required; that $150 was realized over and above the amount due for the boiler, after paying expenses of sale. No complaint was made in the case but that a fair price was obtained for the boiler, but evidence was produced to show that a still better price might have been secured; that the property was sold for $4,300 cash, and an offer of $4,400. $400 down and $1,000 per month for four months was refused. No complaint was made by evidence in the case as to the manner in which the sale was effected, in that it was at private sale, except that defendant allowed a commission to the person who acted as its agent in the matter, while he also obtained a commission from the purchaser.

It appeared, however, that the commission was reasonable except for the fact that the agent took pay from both vendor and purchaser. and further that defendant allowed the commission without knowing that the agent was getting pay from both sides of the trade. There was evidence to the effect that the navigation company, about November 1, 1900, made arrangements with a party to take and pay for the boiler, and notified defendant that it was ready and willing to take the property and pay the sum of $3,067 as the balance due, which was considerably less than the real balance; that at the time of such offer such company had knowledge that arrangements had been partially made to sell the boiler to other parties, that it was on car ready for shipment, and that the true balance due would have to be paid by November 10 or the property would go forward to the proposed purchaser; that upon the day this notice was sent a boiler inspector from Chicago, representing a party in that city, applied for leave to inspect the boiler and was refused because he did not present any evidence of authority in the matter; that several telegrams passed between defendant and the navigation company, but no tender of payment of the balance due was made, nor was any suggestion made that the company, or any one in its behalf was ready to pay the true balance due; that after the company was notified that the boiler would be held for or in its behalf till November 10, and its apparent insistence upon taking the same without paying the full amount due therefor, and defendant becoming informed, as it supposed, through the telegraphic correspondence with its agent and the navigation company, that the latter's activity was to aid a rival of defendant's proposed purchaser to obtain possession of the boiler, it withdrew the offer to hold the property till November 10, and closed the deal with their customer.

The verdict was for plaintiff for $150. Judgment was rendered accordingly.

MARSHALL, J. The view we take of this case renders some of the questions discussed in the briefs of counsel unimportant, if not entirely immaterial to the vital question to be solved. By looking at the facts disclosed in the light of the true situation of parties to an executory sale contract, authorizing the vendee to sell the subject thereof to a third person, and the purpose and effect of making such sale, the case will appear to be a very simple one and the assignments of error require no very lengthy treatment.

If a person contracts to sell and deliver property to another on credit, not retaining any lien thereon, specifically, to secure the purchase money, the presumption is that he acts upon the belief that the latter is solvent, and on condition that he will so remain. If there is a breach in that regard before control of the property passes to the buyer, the seller may withdraw from the contract the element of credit and insist that it shall stand only as an agreement to sell for cash upon delivery of the property, and that the contract as so modified shall be executed; and upon the buyer's neglect or refusal to perform, the seller may have a choice of several remedies for the wrong: "The seller may store the property for the buyer and sue for the purchase price; or may sell the property as agent for the vendee and recover any deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery." Van Brocklen v. Smeallie, 140 N. Y. 70, 75, 35 N. E. 415.

In case he elects to take the second remedy mentioned, the sale of the property is but a mere means of determining the precise amount of the damages caused by the breach, while the incidental effect is to satisfy the loss suffered by the vendor so far as the proceeds of the sale will accomplish that result. Every executory contract for the sale of property upon credit is presumed to have embodied in it the features referred to. Mechem, Sales, § 1647. That is elementary. It is a mistake to suppose that when an executory contract of the character we are considering has been once rightfully modified by eliminating therefrom the element of credit, such element can be revived merely by subsequent ability of the executory vendee to pay for the property. Notwithstanding such subsequent ability, his rights will remain the same as if the contract had originally contemplated cash payment to the vendor upon delivery of the property.

It is also a mistake to suppose that when the modified contract is once breached by the neglect or refusal of the vendee to take the property and pay therefor at the place of delivery, giving the vendor the right to proceed to recover damages for the wrong, he can be debarred from pursuing his remedy by less than an actual tender to him of the amount due upon the contract. Immediately upon the vendee's refusing or neglecting, when required to do so, to comply with the sale contract by paying for the property and accepting delivery thereof, the cause of action of the vendor becomes complete and his right to enforce the same by such appropriate remedies as he may elect to pursue perfect.

If he chooses to liquidate his damages by a sale of the property and incidentally to recover his loss so far as the proceeds of the sale will effect that result, failure to give notice of the intention to sell the property, and failure to do that which is reasonably necessary to secure the best price obtainable therefor, does not give the vendee any right to rescind his contract, but renders the result of the sale not binding on him as to the amount of the vendor's loss by the former's breach, and he will remain liable to the latter for the full market value of the property less his actual damages, independently of the sale. The sale in such circumstances is but a method, as before indicated, of enforcing a right to damages for breach of contract, and of making evidence of the precise amount of such damages. The sale, when properly conducted, the executory vendee having been so notified of the intention to make it as to give him reasonable opportunity to prevent it by paying his debt, constitutes a basis, binding on him, for computing the damages for which he is liable.

The rule governing the subject was laid down in T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513, in these words: "If a resale is made and the evidence shows that all reasonable efforts were made to secure the best price obtainable, or that the price obtained was a fair one, it settles the question of the market value, so that the damages become liquidated."

The idea is that when the executory vendee of property breaks his agreement to take and pay for the property, the measure of damages is the difference between the market value thereof and the contract price; but the vendor must necessarily establish that as a basis for his claim. If he sues for his damages without selling the property, or without selling the same with proper regard to the rights of the executory vendee, he takes upon himself the burden of establishing the fair market value of the goods at the time of the breach. So it is said that notice to the vendee of the vendor's intention to make the sale, and the sale, with proper regard to the interests of the former, merely create definite and conclusive evidence of such market value. T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., supra; Gehl v. Produce Co., 105 Wis. 573, 81 N. W. 666; Davis Sulphur Ore Co. v. Atlanta Guano Co., 109 Ga. 607, 34 S. E. 1011; Mechem, Sales, §§ 1649, 1650.

There is no controversy here but that the Central Navigation & Construction Company, before the boiler was ready for delivery, became hopelessly insolvent. Consequently there can be no controversy but that respondent had the right to withdraw from the contract the element of credit. It did so. There is also no controversy as to whether, upon that being done, it required the navigation company to comply with the modified agreement by a day named or it would proceed to enforce its legal remedy for the breach by selling the boiler. Manifestly, at that stage in the relations between the parties there was but one way for the navigation company to prevent respondent from treating the contract as broken, viz.: by complying with it; and but one way of doing that, viz.: by seasonably tendering to respondent at the place for delivery of the boiler, the balance of the agreed purchase money, being the sum of $4,000. Mere ability to do so, or the making of an arrangement to obtain money therefor, did not affect respondent's rights in the slightest degree.

That answers effectually appellant's first complaint that the trial court erred in rejecting evidence going to show that at the time of the resale parties stood ready to advance to the company money necessary to pay for the boiler; also the second assignment of error, that the court should have directed a verdict for plaintiff since there was no right to sell the boiler in the face of the fact that the navigation company was able to take and pay therefor. It was given ample notice that the property would be sold unless the full amount of $4,000 was paid. Not only was payment not made as demanded, but notice was sent to respondent that the navigation company was willing to pay only $3,067, $933 less than the amount due. The sum and substance of its several communications to respondent prior to the resale was that it insisted upon taking the property without fully complying with the modified contract, and that respondent should desist from efforts to liquidate its damages notwithstanding no tender was made of the full amount due for the property. It seems clear that the attitude of appellant's assignor was such that respondent was fully justified in regarding the contract with such assignor broken. It follows that it had the legal right to liquidate its damages by a resale of the property. Timely notice to such assignor of its intention to do so, and the failure of such assignor to respond by tendering the amount due for the boiler, was sufficient to put the latter in default. Notice of the time and place of the sale was not necessary. Mechem, Sales, § 1637.

The point is made that the navigation company did not make default, because it had the right to inspect the boiler before paying therefor and that it was not allowed to do so. The conclusive answer to that is that, before any demand in that regard was made, the company indicated, as before shown, a willingness to pay only $3,067 as the balance due, while the true balance was $4,000, and that its attitude thenceforward did not change, and that no sum whatever was actually tendered respondent.

The further reason is suggested, why a verdict should have been directed for plaintiff, that the navigation company was not given a reasonable time to take the boiler after the element of credit in the executory contract was eliminated; that respondent proceeded with undue haste to disable itself from complying with the modified contract. That position seems to be untenable in view of the undisputed fact, several times alluded to, that respondent did not treat the contract as broken till the company, in response to the former's demand for the full payment of the balance of $4,000, assumed an attitude in effect refusing to pay that sum.

It is further suggested that respondent breached the contract and gave the navigation company a right to rescind and sue for the downpayment on the boiler because of the sale thereof for $4,300 cash in the face of an offer of $4,400 part cash and the balance on time extending over four months. In that counsel for appellant loses sight of the fact that such a sale is primarily to make evidence of the precise amount of damages suffered by the breach which gives rise to the right to make the sale. Irregularities in procedure to effect the sale do not forfeit the right of sale, but render the result not binding on the parties concerned as evidence. That is all.

The rule on the subject was clearly worked out, as it seems, in T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., supra, thus: "In an action for damages for refusal on the part of the vendee to accept goods as agreed in his contract of purchase, the measure of damages is the difference between the market value of such goods at the time of the breach and the price the vendee agreed to pay; and when a sale is made within a reasonable time, though made at auction, * * * the price obtained is evidence to be considered on the question of the market value at the time of such breach; and if a resale is made and the evidence shows that all reasonable efforts were made to secure the best price obtainable, or that the price obtained was a fair one, it settles the question of the market value so that the damages become liquidated."

In the light of that the record does not disclose any reasonable ground for complaint in regard to the manner the sale was conducted. There is no controversy but that, in view of the nature of the property and the limited number of customers therefor, a private sale, through an agent competent to manage such a transaction, was proper; and there is no evidence that the amount realized was not the fair market value of the boiler. If we should conclude that respondent did not proceed in a way reasonably calculated to secure the best price obtainable for the property, the result would still stand as evidence of the market value thereof and warrant the verdict of the jury, since there was no opposing evidence. But we cannot so conclude. The only circumstance pointed to as indicating that the sale was not fairly conducted is that a cash purchaser was accepted, while a customer stood ready to take the property for $100 more, paying part cash and the balance in one, two, three, and four months. That point is hardly worthy of serious consideration. Obviously, the only purpose of the sale being to make evidence of market value binding upon the navigation company, a cash sale was the only one proper. It would be a very novel proceeding to attempt to prove market value of property, as between parties adversely situated, by what the property would sell for on credit.

There is a further assignment of error in that the court refused to permit proof that the failure of respondent to comply with its contract on time tended to produce the insolvency of the navigation company and its consequent inability to take and pay for the boiler. The insistence of the navigation company upon taking the property notwithstanding the breach as to time of completing it waived any right it might otherwise have had to rescind the contract. That seems plain. That left it bound to perform the contract with the element of credit removed, not waiving, however, any claim it might have for damages because of respondent's breach. No such claim for damages was suggested upon the trial as an excuse for not paying the full amount due respondent previous to the sale, nor as having been assigned to appellant, nor as having any existence as a justification for failure to take the property according to the contract.

A person cannot waive his right to rescind a contract because of a breach thereof by the other party thereto, and at the same time, rightfully, himself breach it, giving such other a right to a remedy for his loss occasioned thereby, and then rescind the contract because such other invokes such remedy. Benj. Sales, § 762. The navigation company having elected to stand by the contract notwithstanding the breach as to time of completing the boiler, the right of respondent was not impaired to enforce it, holding the company liable for damages for any breach on its part, and being liable to the company for any damage caused to it by a violation of its right as regards the time of the completion of the boiler. The doctrine of election of remedies applies, that one having been chosen, all others are deemed waived. Warren v. Landry, 74 Wis. 144, 42 N. W. 247; Crook v. Bank, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17; Bank of Lodi v. Washburn Electric Light & Power Co., 98 Wis. 547, 74 N. W. 363; Carroll v. Fethers, 102 Wis. 436, 78 N. W. 604; Barth v. Loeffelholtz, 108 Wis. 562, 84 N. W. 846; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933.

Complaint is made because the court did not rule that respondent was not entitled to charge the navigation company with $150 paid the agent who sold the boiler, since he also took pay as agent of the purchaser. We apprehend it would be a sufficient answer to that to suggest that if such were the case it could not avail appellants for support of his cause of action for damages based on rescission of the contract; but no reason whatever is perceived why respondent is not entitled, under the circumstances, to charge the amount paid its agent as part of the reasonable expenses of converting the boiler into money. The money was paid in the honest exercise, with due care, of the right to sell the property, and that satisfied respondent's duty to the navigation company. It was by no means an insurer of the company's interests. It was only required to proceed honestly, using all the care that could be reasonably expected under the circumstances, to secure the best price obtainable for the property.

Error is predicated on the refusal of the trial court to give this instruction: "In so selling the defendant must act in good faith and under such circumstances as will be best calculated to produce the fair value of the property. In determining whether such sale was made in good faith you may consider the absence of notice to the Central Navigation & Construction Company of the time and place of sale, which is important, and tends to show a lack of the good faith required."

That was properly refused upon several grounds: (1) Notice of the time and place of the sale, to the navigation company, was not essential, in any event, as regards the right of respondent to liquidate its damages. Mechem, Sales, § 1637. (2) Since it was proper to sell the boiler at private sale (T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., supra), notice of the time and place of sale was obviously impracticable. (3) It is improper to state to a jury that any particular evidentiary circumstance is important as bearing upon the existence or non-existence of some material disputed fact, unless that is so as a matter of law; and such was not the case in the instance under discussion.

This instruction was given, and error assigned thereon: "If from the conduct of said company the defendant had a right to reasonably believe that said company did not intend to pay said sum, or were unable to pay the same, then you may find that they were acting in good faith in electing to sell to others."

That indicates that the trial court did not have a very clear conception of the purpose of the sale,—that the election to make the sale was a mere indication of an election of remedies for the recovery of damages for a breach of contract. Since respondent had a right to treat the contract as broken, it was not bound to consult the navigation company at all, or to regard its interests in merely choosing a remedy for the breach. If the instruction be viewed as indicating that respondent was burdened with any condition as regards its right to make a choice of remedies, it was manifestly wrong, but nonprejudicial to appellant. If it be viewed as referring to the action of respondent in treating the contract of the navigation company as broken, then it is free from error, since, as we have seen, after notifying the company that cash upon delivery of the property would be required and a consummation of the contract in that way insisted upon within a time named, the company's attitude was such as to indicate that it refused to do so.

The court used language to the jury to the effect that, since respondent elected to sell the property, though it was bound in making the sale to proceed in such a manner as was reasonably calculated to secure the best price obtainable therefor, it was not bound to accept the highest price offered regardless of its own interests, so long as the rejection of such price was consistent with the interests of the navigation company. As applied to the facts to which the court undoubtedly referred, the instruction was certainly free from error. Moreover, we fail to see any error in it as the statement of an abstract proposition of law. Certainly, respondent was not obliged to accept an offer to buy the property on credit. The court might well have gone further and said that respondent was not bound to sell on credit at all. The right to make the sale necessarily included the right to make it so as to convert the property into money, not into mere promises to pay money.

We apprehend that if at all points the court had kept definitely in mind that an election to treat the contract as broken was one thing, and choosing and enforcing a remedy for the loss caused by the breach another thing, and that the manner of enforcing it went only to the character of the result as evidence of the amount of the loss caused by the breach, the instructions given to the jury would have been somewhat different. But we fail to perceive any prejudicial error in those we have specially referred to, or any of the others. Justice seems to have been done in the case.

The judgment is affirmed.[22]

## BRIDGFORD v. CROCKER.

(Court of Appeals of New York, 1875. 60 N. Y. 627.)

This was an action, among other things, upon a check drawn by defendants' firm, and transferred to plaintiff by the payee, upon a contract for the sale, by the former, to Gavin & Kelly, of 500 head of cattle. The check was given to Gavin to purchase cattle for defendants. The trial court held, that, under the circumstances, plaintiff could not recover, unless, upon proof, that defendants assented to the use made of the check; and submitted this question to the jury. The court here held, that the evidence was sufficient to warrant such submission.

Gavin & Kelly received all of the cattle, except 126 head; they paid plaintiff, including the check, more than sufficient to pay for the cattle delivered. Plaintiff claimed damages for the refusal to receive the residue, and the court held they were entitled, as damages, to the difference between the market-value, at the time Gavin was to receive them, and the contract-price. It appeared that plaintiff, after holding them until spring, sold them at an enhanced price. Defendants claimed the benefit of the sale. Held, that the ruling of the court was correct; that plaintiff had the election either to tender the cattle and recover the contract-price, or to keep the cattle as his own, and recover his damages, to be determined in accordance with the rulings of the court (Dustan v. Andrews, 10 Bosw. [N. Y.] 130, questioned); and that it mattered not, and could not be taken into consideration what plaintiff received upon a subsequent sale of the cattle; if the cattle rose in the market, after the failure to perform, the plaintiff, not the defendants, was entitled to the benefit of the enhanced value.

GROVER, J., reads for affirmance. All concur.

Judgment affirmed.

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[22] In Wrigley v. Cornelius, 162 Ill. 92, 44 N. E. 406 (1896), Craig, J., said: "There may be, and doubtless are, cases where the vendor would be required to give the vendee notice before making a sale. But the conduct of the vendee may be such that notice will be waived. Where, as was the case here, there is an absolute refusal on behalf of the vendee to receive the goods, and the vendor is notified to do what he may choose with them, no notice of re-sale will be required." Compare Ridgley v. Mooney, 16 Ind. App. 362, 45 N. E. 348 (1896). And see Williston, Sales, § 548.

# CHAPTER VI

# REMEDIES OF THE SELLER ON THE CONTRACT

## SECTION 1.—IN GENERAL

### ATKINSON v. BELL.

(Court of King's Bench, 1828. 8 Barn. & C. 277.)

See ante, p. 89, for a report of the case.

### BEMENT v. SMITH.

(Supreme Court of New York, 1836. 15 Wend. 493.)

This was an action of assumpsit, tried at the Seneca circuit in November, 1834, before the Hon. Daniel Moseley, one of the circuit judges.

In March, 1834, the defendant employed the plaintiff, a carriage maker, to build a sulky for him, to be worth ten dollars more than a sulky made for a Mr. Putnam; for which he promised to pay $80, part in a note against one Joseph Bement, a brother of the plaintiff, for the sum of ten or eleven dollars, and the residue in his own note, at six or twelve months, or in the notes of other persons as good as his own. In June, 1834, the plaintiff took the sulky to the residence of the defendant, and told him that he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant denied having agreed to receive the carriage. Whereupon the plaintiff told him he would leave it with a Mr. De Wolf, residing in the neighborhood; which he accordingly did, and in July, 1834, commenced this suit. It was proved that the value of the sulky was $80, and that it was worth $10 more than Putnam's. The declaration contained three special counts, substantially alike, setting forth the contract, alleging performance on the part of the plaintiff, by a delivery of the sulky, and stating a refusal to perform, on the part of the defendant. The declaration also contained a general count, for work and labor, and goods sold.

The judge, after denying a motion for a nonsuit, made on the assumed grounds of variance between the declaration and proof, charged the jury that the tender of the carriage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the judge to charge the jury that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, &c. The judge declined so to charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with $83.26 damages. The defendant moved for a new trial. The cause was submitted on written arguments.

SAVAGE, C. J. The defendant presents no defence upon the merits. His defence is entirely technical, and raises two questions: 1. Whether the tender of the sulky was equivalent to a delivery, and sustained the averment in the declaration that the sulky was delivered; and 2. Whether the rule of damages should be the value of the sulky, or the particular damages to be proved, resulting from the breach of the contract. There is no question raised here upon the statute of frauds. The contract is therefore admitted to be a valid one; and relating to something not in solido at the time of the contract, there is no question of its validity.

The plaintiff agreed to make and deliver the article in question at a particular time and place, and the defendant agreed to pay for it, on delivery, in a particular manner. The plaintiff made, and, as far as was in his power, delivered the sulky. He offered it to the defendant at the place and within the time agreed upon. It was not the plaintiff's fault that the delivery was not complete, that was the fault of the defendant. There are many cases in which an offer to perform an executory contract is tantamount to a performance. This, I apprehend, is one of them.

The case of Towers v. Osborne, 1 Strange, 506, was like this. The question here presented was not raised, but the defendant there sought to screen himself under the statute of frauds. The defendant bespoke a chariot, and when it was made, refused to take it; so far the cases are parallel. In an action for the value, it was objected that the contract was not binding, there being no note in writing, nor earnest, nor delivery. The objection was overruled. In that case the action was brought for the value, not for damages for the breach of contract. This case is like it in that particular; this action is brought for the value, that is, for the price agreed on; and it is shown that the sulky was of that value.

The case of Crookshank v. Burrell, 18 Johns. 58, 9 Am. Dec. 187, was an action in which the plaintiff declared against the defendant on a contract whereby the plaintiff was to make the woodwork of a wagon, for which the defendant was to pay in lambs. The defendant was to come for the wagon. The question was upon the statute of frauds. Spencer, Ch. J., states what had been held in some of the English cases, Clayton v. Andrews, 4 Burr. 2101, and Cooper v. Elston, 7 T. R. 14, that a distinction existed between a contract to sell goods then in existence, and an agreement for a thing not yet made. The latter is not a contract for the sale and purchase of goods, but a contract for work and labor merely.

The case of Crookshank v. Burrell is much like this, with this exception: there the purchaser was to send for the wagon; here the manufacturer was to take it to him. There it was held that the manufacturer was entitled to recover, on proving that he had made the wagon according to contract: here it is proved that the sulky was made, and taken to the place of delivery according to contract. The merits of the two cases are the same. It seems to be conceded that an averment of a tender of the sulky by the plaintiff, and a refusal of the defendant to receive it, would have been sufficient; and if so, it seems rather technical to turn the plaintiff out of court, when he has proved all that would have been required of him to sustain his action.

The plaintiff, in his special counts, does not declare for the sale and delivery, but upon the special contract; and herein this case is distinguishable from several cases cited on the part of the defendant, and shows that it was not necessary to have declared for goods bargained and sold. It seems to me, therefore, that the judge was right in refusing the nonsuit, and in holding that the evidence showed substantially a fulfillment of the contract. The variance as to the amount of Joseph Bement's note, I think, is immaterial; but if otherwise, it may be amended. The alleged variance as to the price of the sulky is not sustained by the facts of the case.

The only remaining question, therefore, is as to the damages which the plaintiff was entitled to recover. It is true that the plaintiff does not recover directly as for goods sold; but in the case of Towers v. Osborne the plaintiff recovered the value of the chariot, and in Crookshank v. Burrell the recovery was for the value of the wagon. The amount of damages which ought to be recovered was not the question before the court in either of those cases; but if the value of the article was not the true measure, we may infer that the point would have been raised. Upon principle, I may ask, what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it: is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another, and sue for the difference between the contract price and the actual sale. Sands & Crump v. Taylor & Lovett, 5 Johns. 395, 410, 411, 4 Am. Dec. 374; Langfort v. Tiler, 1 Salkeld, 113, 6 Modern, 162.

In the first of these cases, the plaintiffs sold the defendants a cargo of wheat. The defendants received part, but refused to receive the remainder. The plaintiffs tendered the remainder, and gave notice that unless it was received and paid for, it would be sold at auction, and the defendants held responsible for any deficiency in the amount of sales. It was held, upon this part of the case, that the subsequent sale of the residue was not a waiver of the contract, the vendor being at liberty to dispose of it bona fide, in consequence of the refusal of the purchaser to accept the wheat. This case shows that where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part. The defendant refused to receive the sulky. The plaintiff might, upon notice, have sold the sulky at auction, and if it sold for less than $80, the defendant must have paid the balance.

The reason given by Kent, Ch. J., 5 Johns. 411, 4 Am. Dec. 374, is that it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. But if after tender or notice, whichever may be necessary, the vendor chooses to run that risk and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.

The question upon the action being prematurely brought before the expiration of the credit which was to have been given, cannot properly arise in this case, as the plaintiff recovers upon the special contract, and not upon a count for goods sold and delivered.

New trial denied.[1]

## GORDON v. NORRIS et al.

(Supreme Judicial Court of New Hampshire, 1870. 49 N. H. 376.)

Assumpsit, by Nathaniel Gordon against John L. Norris and George B. Neal, on account annexed, and for goods sold and delivered and goods bargained and sold, with a special count for not taking and paying for a quantity of hay alleged to have been sold by the plaintiff to the defendants, on June 5, 1867, at $38 per ton. The suit was brought January 30, 1868, to recover the price of twenty-seven tons and six hundred pounds of hay sold, after deducting the sum of $500, advanced towards it by the defendants. * * * [2]

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[1] See also Hayden v. Demets, 53 N. Y. 426 (1873).

[2] Part of the statement of facts and part of the opinion are omitted.

SARGENT, J. * * * The remaining question is as to the rule of damages that the referee should have adopted, whether in finding upon the special contract as we assume he did, he should have allowed the plaintiff as damages the whole of the contract price, or only the difference between the contract price, and the market price at the time the contract was broken.

Sedgwick, in his work on damages (5th Ed.) page 312, says:

"When the vendee is sued for nonperformance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement. But if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases, that the vendor can resell them if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale.

"But if the vendor does not pursue this course, and without reselling the goods, sues the vendee for his breach of contract, the question arises, which we have already stated, whether the vendor can recover the contract price or only the difference between that price and the value of the goods which remain in the vendor's hands, and the rule appears to be that the vendor can recover the contract price in full."

He cites as an authority, Graham v. Jackson, 14 East, 498; which was upon a special contract to purchase three hundred tons of Campeachy log wood at £35. per ton, to be of real merchantable quality, and such as might be determined to be otherwise by impartial judges to be rejected. Under this contract the plaintiff, the vendor, had shipped the three hundred tons of log wood from New York and tendered it to the purchaser in England. It was held that under that contract and the circumstances of the case, the vendee was bound to take so much of the wood tendered as turned out to be of the sort described, at the contract price, though it turned out upon examination that sixteen out of the three hundred tons, was of a different and inferior quality. But this was a construction given to that particular contract, and not the statement of any general principle, to be applied to all cases.

He then says: "The question has been considered in New York and decided in the same way." He cites Bement v. Smith, 15 Wend. 493. But an examination of that case shows, that the decision is put upon the express grounds that what the plaintiff did in the case amounted to a delivery of the property. The declaration was for work and labor and goods sold, and also upon special counts, setting forth the contract and alleging a delivery of the goods by plaintiff. This cannot be an authority for the doctrine claimed.

But there is a distinction between that case, and the ordinary cases of goods sold and delivered, which is alluded to in the opinion viz., the distinction between a contract to sell goods, then in existence, and an agreement to furnish materials and manufacture an article in a particular way, and according to order, which is not yet in existence. The latter is said not to be so much a contract for the sale and purchase of goods, as a contract for work and labor merely, and it is held that in that class of cases the statute of frauds does not apply, when there is nothing paid and no actual delivery.

In a large class of cases of that kind, where the plaintiff has made surgical instruments of a particular kind, and according to order, for the defendant who had patented the same, and which would of course be worthless in the hands of the plaintiff, or where a tailor had made a suit of clothes to order, of a particular description, and for a particular measure, or a shoemaker had made boots or shoes to order and of a particular size and pattern, or the carriage maker had made a carriage in the same way, of a particular style and pattern, or the artist has painted a portrait of an individual to order, or an engineer has constructed an engine according to order for a particular use, &c., though the mechanic or artist may sell the goods, if he choose, and recover of the defendant, the difference between the contract price, and the price for which the article was sold, yet it is held that he may if he choose, when he has fully performed his part of the contract and tendered the article thus manufactured to the defendant, or offered it at the place appointed, recover the full value of the article and leave the defendant to sell or use or dispose of the article at his pleasure, and for the reason, in addition to that already stated that the article thus manufactured for a particular person, or according to a particular pattern, or for a particular use, may be of comparatively little value to any body else, or for any other use or purpose, but this class of cases are recognized as exceptions to the general rule, which is to be applied in the sale of ordinary goods or merchandise which have a fixed market value. Allen v. Jarvis, 20 Conn. 38; Bement v. Smith, 15 Wend. (N. Y.) 493, and cases; Ballantine v. Robinson, 46 Pa. 177.

Mr. Sedgwick also cites a case from Massachusetts as sustaining his view. Thompson v. Alger, 12 Metc. 428. But an examination of the case shows that it was a contract for the purchase and sale of railway shares and that there had been a part payment for the same, and that while the contract was in force, the plaintiff had actually transferred the stock on the books of the company to the vendee, so that the plaintiff had actually lost his title to the shares, and upon this special ground the court held that plaintiff was entitled to recover the contract price. But in that case it is stated distinctly that the general rule in that state, is, that in contracts for the sale of personal property, the defendant would be liable to pay the difference between the agreed price and the market value of the goods on the day of delivery.

Dewey, J., in the opinion, 12 Metc. (Mass.) 443, says, that in ordinary cases this rule would do entire justice to the vendor. He would retain the property as fully in his hands as before, and a payment of the difference between the market price and the price stipulated, would fully indemnify him. And that in that case, if the defendant had repudiated the contract before any transfer of stock had been made to him on the books of the corporation, that rule might have been properly applied here. This case then stands upon special grounds, but it states fully and plainly what the general rule is understood to be in that state, and is by no means an authority for the doctrine which the author seeks to establish.

Mr. Sedgwick admits that where the plaintiff has not the goods that he agrees to sell, but makes a side contract with another to furnish them, he will only be allowed to recover the difference between the original contract price and the market price at the time of the offer with interest. He then cites some authorities where goods were sold and delivered, to be paid for by bill or note payable at a future day, and the bill or note is not given. There though the vendor cannot maintain assumpsit for the goods sold and delivered, until the term of credit has expired, yet he may sue immediately for the breach of the special agreement, and may recover as damages the whole value of the goods. But that does not militate against the general rule, because it comes under another general rule, that when the goods are sold and delivered, the contract price is the measure of damages.

We have seen that the general rule in Massachusetts, in actions for the non-acceptance of property sold or contracted for, is the difference between the price agreed to be paid for it and its real value, or market price. Thompson v. Alger, 12 Metc. 428, 443.

Such is distinctly stated to be the general rule in Connecticut, in Allen v. Jarvis, 20 Conn. 38; and in Pennsylvania, Girard v. Taggart, 5 Serg. & R. 19; Ballentine v. Robinson, 46 Pa. 177; and in Wisconsin, Ganson v. Madigan, 13 Wis. 67; and in New York, Dana v. Fiedler, 12 N. Y. 41, 62 Am. Dec. 130; Orr v. Bigelow, 14 N. Y. 556; Dey v. Dox, 9 Wend. 129, 24 Am. Dec. 137; Davis v. Shields, 24 Wend. 322; Stanton v. Small, 3 Sandf. 230; Mallory v. Lord, 29 Barb. 454, 465; and in Missouri, Whitmore v. Coates, 14 Mo. 9; also, in Kentucky, Williams v. Jones, 1 Bush, 621, 627, in which Hardin, J., delivering the opinion says: "The true measure of damages for the failure to receive and pay for property contracted for is not the contract price, but it is the difference between the contract price and the actual value of the property, when it should have been received under the contract."

So in a contract for the sale of railway shares. The rule of damages, which either party is entitled to recover, is the difference between the contract price and the market price at the time of delivery. Red. on Rail. (Ed. of 1858) 54; 1 Red. on Rail. 132, and cases cited.

There is some diversity prevailing in regard to the rule of damages for breach of a contract for the sale and purchase of lands. In New York, it is held that in an action against the purchaser for not receiving a deed and paying for lands bargained for, the damages are the whole value of the land, though the purchaser gets no title to it. Richards v. Edick, 17 Barb. 260.

But such is not the rule in the English courts. Laird v. Prince, 7 Mees. & W. 474, and cases cited. Neither is such the rule in Massachusetts; for though there are dicta favoring the New York rule,—in Sears v. Boston, 16 Pick. 357; in Gill v. Bicknell, 2 Cush. 358; and in Jacobs v. Railroad, 8 Cush. 223,—yet the question is directly raised, considered and decided in Old Colony Railroad v. Evans, 6 Gray, 25, 66 Am. Dec. 394, in which it is held that "upon more full consideration of the question of the measure of damages in an action at law, when the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is, the difference between the price agreed to be paid for the land, and the salable value of the land at the time the contract was broken."

In this state we find it settled in Stevens v. Lyford, 7 N. H. 360, that upon a breach of a contract for the delivery of lumber, the purchaser was entitled to recover the difference between the value of the lumber at the place where it was to be delivered, and the sum to be paid. And in Rand v. Railroad, 40 N. H. 79, it is assumed that the same rule would apply to the vendor, and that the proper rule of damages in case the subscriber of railroad stock refuses to pay for and receive the same, when no certificate of the stock has been issued, would be the difference between the price at which he agreed to take the stock, and its actual or market value at the date of the breach of the contract.

And in McKean v. Turner, 45 N. H. 203, 205, Bellows, J., in commenting upon Rand v. Railroad, supra, says: "There the claim was upon the contract of the trustee to take and pay for some shares in the capital stock of the corporation, which shares had never been delivered or accepted. The measure of damages, therefore, was the difference between the contract price and the actual value of the stock at the time of the breach of the contract, and ordinarily the market value of stock can readily be determined."

In the case before us, we understand from the case that the referee found that the property had not passed to the defendant. It was not a specific article of property that had been manufactured to order for the defendant, but the property in question was hay, which had a market value easily ascertainable. Upon the finding of the referee, as we understand it, this property remained not only in the possession of the plaintiff but his property.

We think in such a case, it would be in accordance with the great weight of authority, besides being reasonable and just in itself, to hold that the rule in assessing plaintiff's damages, would be to give him the difference between the contract price of the hay and its market value, at the time when the defendant should have received and paid for it; taking into account, of course, the fact that by the contract the plaintiff was to draw the hay to the depot to be delivered, which was included in the contract price.

According to the provisions of the case, the report is set aside and the cause recommitted to the referee.

## TUFTS v. GREWER.

(Supreme Judicial Court of Maine, 1891. 83 Me. 407, 22 Atl. 382.)

Peters, C. J. It becomes immaterial whether the writing signed by the parties in this case be considered a contract of sale or a contract to manufacture an article upon the order of the defendant, inasmuch as we feel convinced that the rule of damages would be the same in this state whether it be the one or the other kind of contract.

The defendant ordered a soda-fountain of the plaintiff, which was manufactured and tendered to him, and the price demanded. It is admitted that the plaintiff performed all the requirements of the contract resting on him, and that the defendant without legal excuse failed to perform his part of the obligation, utterly refusing to pay for or accept the property. The action is special, reciting that, although the plaintiff has performed his promise, the defendant refuses to perform his, the plaintiff claiming to recover for the breach the full contract price of the article sold.

The general rule is familiar that for the vendee's failure to receive and pay for the goods he has contracted for the vendor may recover the difference between the market value at the time and place stipulated for delivery and the contract price, together with the expenses of reselling the property. The general rule is not questioned, but the plaintiff contends that a special and more equitable rule governs when a vendor has manufactured the article after a particular pattern upon the order of the vendee, who refuses without excuse to accept the same. The plaintiff says: "I have done all I bargained to do, and now the defendant should be compelled to do what he bargained to do, namely, to pay the contract price."

We feel that there is force in the plaintiff's position, supported as it is by considerable authority; but we are inclined to believe that there should be but one rule of damages in cases where a vendee refuses to accept goods which he has agreed to purchase, whether the article to be delivered to the vendee is already in existence or is to be manufactured on his account. Wherein does the general rule fail to furnish an efficacious remedy? The vendor was to receive in this case money and notes. While the law fully recognizes the obligation of the vendee, and cannot require specific performance, it undertakes to make full reparation by allowing recovery for all the damages sustained. What difference, practically, can there be between a seller receiving the consideration wholly from the vendee or partly from him and the balance from some one else? The law in its own way obtains for the vendor an equivalent for full execution of the contract.

There are courts which have held that, in all cases where a vendee refuses to accept the goods contracted for by him, the vendor may recover the contract price as damages. There is a stronger leaning among judges towards the distinction set up in the present case, in favor of applying such a principle only when the contract calls for an article to be manufactured especially for the vendee. The ground upon which this doctrine is defended by its advocates is that the peculiarly manufactured article is of little value to any one besides the vendee, if of any marketable value whatever. The answer to this position is, of course, that the less the goods are worth to sell in the market the more the plaintiff recovers, and, if they are worth nothing at all, then he recovers the full contract price. But such a result is just as logically attainable under the application of the general as by any special rule. The great ground of objection to the rule invoked by the plaintiff is that, where there has been no acceptance of the property, the title still remains in the vendor, liable to be taken for his debts, or pass to his assignee in bankruptcy, or be sold by him to another purchaser. A tender does not, in our law, transfer the title to the vendee. The facts show that the plaintiff was to retain title to the fountain until the price should be paid. But the defendant refused to make the partial cash payment called for by the terms of sale, or to accept any possession or control of the property, so that even an equitable title to the property did not pass to him.

The rule invoked here has not been much noticed in the English law, but finds its principal support in this country, and still even here it will be found, we think, to be in contradiction of most of the authorities. The first case in this country sustaining this special rule was Bement v. Smith, 15 Wend. (N. Y.) 493. In Dustan v. McAndrew, 44 N. Y. 72, although the case called for no such classification, the opinion formulates the law on the point in question in the following manner: (1) The vendor may store or retain the property for the vendee, and sue him for the entire purchase price; (2) or he may sell the property, acting as agent of the vendee, and recover the difference between the contract price and the price obtained on such resale; (3) or he may keep the property as his own, and recover the difference between market price and the contract price. This formulary seems to have crept into several text-books, receiving more or less approbation from the authors. The special rule was approved in Massachusetts, as limited to cases where the article to be sold was stock in a corporation, the vendor having tendered the certificate made out in the name of the vendee. Thompson v. Alger, 12 Metc. (Mass.) 428. The court there said, in response to a suggestion that the general rule should apply: "Such would be the general rule as to contracts for the sale of personal property, and such rule would do entire justice to the vendor. He would retain the property as fully in his own hands as before, and a payment of the difference between the market price and that stipulated would fully indemnify him."

The most exhaustive case cited in plaintiff's behalf is Shawhan v. Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313, reported also with a lengthy editorial note in 15 Amer. Law Reg. (N. S.) 153. The opinion relies for support largely on the case of Bement v. Smith, supra, and Ballentine v. Robinson, 46 Pa. 177. The author of the note referred to, after quoting from Laubach v. Laubach, 73 Pa. 392, as holding a doctrine at variance with the preceding Pennsylvania case, closes his observations with the following: "It must be admitted that Ballentine v. Robinson, and Bement v. Smith, and the principal case, can only be reconciled with what appears to be the general line of the authorities, by saying that in them tender by the vendor, or conduct amounting to an acceptance upon the part of the vendee, was considered to have passed the property in the goods to the latter. In the contract upon which the principal case was brought, the plaintiff's shop was fixed as the place of delivery, and it might be argued that the completion of the carriage at the time and place appointed amounted to delivery. But the unqualified position laid down in the rule that, when the vendee refuses to receive the goods upon tender, the vendor may store or retain them, and sue for the contract price, though adopted by Sedgwick and Parsons, does not seem borne out by the authorities." Since this note was written, the editors of the seventh edition of Sedgwick on Damages say in note, (volume 1, p. 596:) "We do not think the distinction taken in Shawhan v. Van Nest can be supported." It is also said in note on same page: "This [the doctrine of the text] now is held to be the proper rule only where the title has passed." See numerous cases cited in note, Benj. Sales, (7th Ed.) § 758.

A formidable barrier against the plaintiff's recovery upon the theory of damages claimed by him is that the question has been virtually decided in this state against such theory. In Atwood v. Lucas, 53 Me. 508, 89 Am. Dec. 713, it was held that an action of assumpsit for goods sold and delivered cannot be sustained where the goods have not been accepted by the vendee. In Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640, it was held that such an action would not lie, although the articles claimed to be sold were manufactured after a peculiar pattern for the special use of the vendee, who refused to accept them when tendered to him. In the latter case the action did not, as the present action does, allege a claim against the defendant for damages for not accepting and paying for the goods, but went upon the theory of goods sold and title passed. But no question of pleading was discussed in the case, and the opinion, taking no objection to the declaration, determines that upon the facts in proof no more damages were recoverable than the difference between contract price and market value. The case was decided on the legitimate effect of the facts, and not upon the form of the action. The court dissents from the doctrine of the case of Bement v. Smith, 15 Wend. (N. Y.) 493, before cited, as wrong in principle, and contradictory "to the result of the best considered cases."

But then we are confronted with the case of Oatman v. Walker, 33 Me. 67, where the plaintiff was allowed to recover against the defendants the contract price of land which they had agreed to purchase of the plaintiff, afterwards repudiating their contract. The facts do not appear to be fully reported, but it looks like a case where the defendants were to repurchase a parcel of land they had conveyed to the plaintiff, thereby rescinding a former contract. Such a case may be an exception to the general rule. Laubach v. Laubach, 73 Pa. 387, before cited. The opinion in a few words merely follows the case of Alna v. Plummer, 4 Me. (4 Greenl.) 258, where the same rule was adopted without argument or explanation, and barely with words from either counsel or court. In both cases the decision was an assumption merely. The case of Railroad Co. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394, strongly antagonizes those cases, the opinion in the case citing a long list of authorities in support of a contrary doctrine.

Exceptions sustained.[3]

WALTON, VIRGIN, LIBBEY, HASKELL, and WHITEHOUSE, JJ., concurred.

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## PUTNAM v. GLIDDEN.

(Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394.)

Contract to recover for the keeping, care, etc., of one pair of horses, from June 16, 1890, to October 17, 1891. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows.

On June 16, 1890, the plaintiff, who was then the owner of the horses, had negotiations with the defendant in relation to a sale of them, by which they were delivered by the plaintiff at the defendant's stable in Lowell.

The plaintiff contended that the negotiations so made, and the delivery, amounted to an absolute sale.

The defendant contended that the sale was subject to the approval of his veterinary surgeon, who was to examine the horses and report whether or not they were sound.

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[3] A recent good case in support of the same view, is Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co., 86 Neb. 623, 126 N. W. 293, 136 Am. St. Rep. 710 (1910).

On June 17 the defendant returned the horses to the plaintiff's stable, contending that his veterinary surgeon reported one of the horses to be unsound, and that he had a right to return them under the contract. The plaintiff on the next day delivered to the defendant the following notice in writing:

"You are hereby notified that the pair of horses sold by me to you on Monday, the 16th day of June current, and on that day delivered to you, for the sum of eight hundred dollars, and which were returned by you to my stable on Tuesday, the 17th day of June current, are still at my stable, but as your property and not as my own; that said horses are subject to your order and control; that any expense I am at in keeping said horses and for medical attendance on one of them on account of an injury received by it after they were delivered to you and while in your possession, I shall charge to you and seek to recover the same of you in addition to the agreed price of eight hundred dollars.

"You are further requested to remove said horses from my premises, and are hereby notified that the same are at my stable at your risk, and that I shall not be responsible for any accident or injury to them."

The plaintiff brought an action of contract against the defendant for the purchase price of the horses under the sale referred to, on June 21, 1890, and the cause came to trial in the Superior Court for the County of Middlesex, at the September term, 1891, when a verdict and judgment were rendered for the plaintiff for the contract price, and the defendant paid the amount of said judgment and costs; and on said October 17 the defendant called for the horses at the plaintiff's stable, and the plaintiff delivered them to the defendant.

The action above mentioned was solely to recover the contract price, and during the time the plaintiff kept the horses they were not used by him.

If upon the above facts the plaintiff was entitled to recover for keeping the horses during the above mentioned period, then judgment was to be entered for the sum of five hundred and thirty-two dollars. If the plaintiff was entitled to recover for the care and keeping during such time only as would enable the plaintiff to resell the horses to advantage, then it was agreed that twenty-one days from and after June 17, 1890, would give the plaintiff a reasonable time in which to make the sale, and judgment was to be entered for the sum of thirty-five dollars; otherwise, judgment was to be entered for the defendant.

KNOWLTON, J. On the agreed statement of facts in this case, the question is whether the law implies a contract on the part of the defendant to pay for the keeping of the horses. The burden of proof is on the plaintiff, and no inferences of fact can be drawn in his favor. Railroad Co. v. Wilder, 137 Mass. 536.

It has been said that when a vendee returns or declines to receive property sold him the vendor has his choice "of either one of three methods to indemnify himself: First, he may store or retain the property for the vendee, and sue him for the entire purchase price; second, he may sell the property, acting as an agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, third, he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." Dustan v. McAndrew, 44 N. Y. 72, 78; Haines v. Tucker, 50 N. H. 313; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; Rosenbaum v. Weeden, 59 Va. 785, 98 Am. Dec. 737; Holland v. Rea, 48 Mich. 218, 224, 12 N. W. 167; Cook v. Brandeis, 3 Metc. (Ky.) 555; Bagley v. Findlay, 82 Ill. 524.

Where the vendee contends that the property is not his, and treats it as belonging to the vendor, and the vendor elects to keep it for the vendee, and sue for the entire contract price, there is no implied contract on the part of the vendee to pay the vendor the expense of keeping it. Whiting v. Sullivan, 7 Mass. 107; Earle v. Coburn, 130 Mass. 596. In such cases, when there is a controversy about the title, the election of the vendor to take care of the property is often more for his own benefit, in view of the risk that the main question in dispute may be decided against him, than for the benefit of the vendee, and the attitude of the vendee is equivalent to an express prohibition of the keeping on his account and at his expense. If the vendor wishes to avoid the expense of keeping, and at the same time to avail himself of the value of the property, he may sell under an implied agency for the vendee, and sue for the balance above what he obtains after paying the reasonable expenses.

In the present case the plaintiff elected to sue for the entire contract price, and in the opinion of a majority of the court there is no principle of law which permits him now to maintain a second suit for the expense of keeping the horses, either during the whole time while the litigation was pending, or for that part of it which would have been required to enable him properly to dispose of the horses if he had chosen to sell them on the defendant's account, and, after applying the proceeds, to sue for the balance due him.

Judgment for the defendant.[4]

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[4] See criticism of this case in Williston, Sales, § 559.

## SECTION 2.—IN "CONDITIONAL SALES"

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### WHITE et al. v. SOLOMON.

(Supreme Judicial Court of Massachusetts, 1895. 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.)

Holmes, J.[5] This is an action upon the following contract:

"White's Physiological Manikin.

"Place and date: 75 Court Street, Boston, Mass., June 7, 1889.

"Messrs. J. T. White & Co., Publishers, New York—Gentlemen: Please deliver, according to shipping directions given below, one White's Physiological Manikin, Medical Edition, price $35.00. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of $35.00, as follows: $10.00 upon delivery at the express office, and the balance in monthly payments of $5.00, each payable on the first of each and every month thereafter, until the whole amount is paid, for which the publishers are authorized to draw when due.

"It is expressly hereby agreed that, in case of the failure to pay any one of the said installments after maturity thereof, all of said installments remaining unpaid shall immediately become due and payable, and the said James T. White & Co. may take, or cause to be taken, the said manikin from the possession of the said [subscriber] or their representatives, to whom he may have delivered the same, without recourse against said James T. White & Co. for any money paid on account thereof; it being expressly agreed that the money paid on account shall be for the use and wear of said manikin.

"Shipping directions (to be filled out by the agent):
"To whom sent, J. M. Solomon, 75 Court Street.
"Town, Boston. County of Suffolk.
"State, Massachusetts.
"James M. Solomon, 75 Court Street.
"Agent, W. F. Byrd."

There was evidence, and we must assume the judge who tried the case to have found, that the manikin was delivered, as agreed, to the express company, freight prepaid; that the defendant refused to receive it; that, in consequence, the express company, after a time, left the manikin at the plaintiffs' place of business, in pursuance of a rule of the company, and without the plaintiffs' assent; and that it is held subject to the defendant's order. There had been no repudiation of the contract by the defendant before the delivery of the manikin at the express office.

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[5] Part of the opinion is omitted.

The main question is whether the judge who tried the case ought to have ruled that "the plaintiffs are not entitled to recover the price of the article in question, but must offer evidence to the court upon the question of damages for the alleged breach of said contract." A majority of the court are of opinion that this ruling properly was refused. We assume in favor of the defendant, but without deciding, that the title to the manikin did not pass by delivery at the express office; but that assumption does not dispose of the case. In an ordinary contract of sale, the payment and the transfer of the goods are to be concurrent acts; and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and, although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods.

But in the case at bar the buyer has said in terms that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly solvendum in futuro), of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words "in consideration of its delivery" are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum. See the observations of Blackburn, J., in Martineau v. Kitching, L. R. 7 Q. B. 436, 455. Benj. Sales (4th Ed.) 716, 717. When, as here, all the conditions have been complied with the performance of which by the terms of the contract entitles the vendors to the whole sum, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot, by an act of his own repudiating the title, gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised. See Smith v. Bergengren, 153 Mass. 236, 238, 26 N. E. 690. 10 L. R. A. 768.

If the first payment of $10 upon delivery were to be made upon delivery to the buyer, it well may be that, if the buyer refused to accept the manikin or to pay the $10, the sellers' only remedy would be for a breach, and that they could not leave the manikin at his house, and waive the payment against his will, with the result of making the whole sum due. But here the delivery is to be to an express company, and the provision for payment of $10 "upon delivery at the express office" must mean after the delivery; so that the delivery is the first act, and by itself, without more, fixes the rights of the vendors to the price, just as the transfer of the stock did in Thompson v. Alger, 12 Metc. 428, 444. Our decision is in accord with the following cases (we know of no decisions to the contrary): Safe Co. v. Emanuel, 21 Abb. N. C. (N. Y.) 181; Brewer v. Ford, 54 Hun, 116, 120, 7 N. Y. Supp. 244; Id., 59 Hun, 17, 19, 12 N. Y. Supp. 619; Id., 126 N. Y. 643, 27 N. E. 852; Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79. See, further, Burnley v. Tufts, 66 Miss. 48, 5 South. 627, 14 Am. St. Rep. 540; Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863. But compare Tufts v. Grewer, 83 Me. 407, 22 Atl. 382; Swallow v. Emery, 111 Mass. 355, 357. * * *

Exceptions overruled.[6]

## BAILEY v. HERVEY et al.

(Supreme Judicial Court of Massachusetts, 1883. 135 Mass. 172.)

Tort, against William H. Hervey and Charles H. Pray, copartners doing business under the firm name of William H. Hervey & Company, for the conversion of certain personal property. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, upon an agreed statement of facts, in substance as follows:

On or about May 25, 1877, the plaintiff and the defendant Hervey, who was then doing business under the name of W. H. Hervey & Company, entered into a written contract, altered, added to and re-executed on September 10, 1878, which recited that the plaintiff had "hired and received" from said firm certain goods enumerated, for which he agreed to pay them certain sums of money as "rent" at stated times, and "the balance," at a certain rate per month, "until paid;" that, upon default in making such payments, his right to retain said goods should cease; and that no title to the property should vest in him until he had performed all the conditions of the agreement, upon the performance of which the title should so vest. The goods and chattels described in said contract were delivered to the plaintiff; and from the time of such delivery he continued to use the same until they were taken from him, as hereinafter stated. The plaintiff made sundry payments on account of said contract, amounting in the whole to $128, for each of which a receipt was given, acknowledging payment of the amount stated therein "on account of goods leased."

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[6] Field, C. J., wrote a dissenting opinion, in which Allen and Morton, JJ., concurred.

After demands by Hervey for further payment, and neglect by the plaintiff to pay, Hervey brought an action on said contract against the plaintiff, by writ dated January 13, 1880, and made returnable to the following April term of the Superior Court for the county of Suffolk. In that action the Boston and Maine Railroad was summoned as trustee. The defendant Bailey did not enter an appearance, and was defaulted at the return term of the writ. At the following October term of said court, namely, on November 17, 1880, Hervey recovered judgment therein against the defendant, in the sum of $100.71, debt or damage, and $23.44 costs of suit, and execution issued on November 27, 1880; on which was received from the trustee by the attorneys of Hervey the sum of $5.07, of the fund attached in said suit, the receipt of which they acknowledged on the back of said execution, in part satisfaction thereof. The declaration in that action alleged the making of the contract, and its breach, and that the defendant owed the plaintiff $95.76, for "rent and interest," under the contract. Said judgment and execution remain wholly unsatisfied, except as to said $5.07.

On October 13, 1880, the defendants in this action, by their servants, acting or claiming to act by virtue of the contract, and under the license and power contained in the contract in case of the plaintiff's default as to payments to be made by him as provided in the contract, entered the plaintiff's house and premises, and took all of the articles enumerated in the contract which they could find, and being the same mentioned in the plaintiff's declaration, and carried them away, against the will and without the consent of the plaintiff, and converted the same to their own use.

After the contract was made, the defendant Pray became copartner of the defendant Hervey, and so was interested in the contract and in its performance, and was such copartner when the goods were taken.

If, upon these facts, the plaintiff was entitled to maintain his action, judgment was to be entered for him in the sum of $100 and costs; otherwise, judgment for the defendants.

C. ALLEN, J. By the terms of the written agreement, the plaintiff was bound at all events to pay to the defendants the full amount at which the goods were valued, and upon such payment the title was to vest in him. This payment, therefore, constitutes the agreed price of the goods, and it is a misnomer to call it rent. The defendants would have no right to exact payment in full of the money, and also to reclaim the goods. When the plaintiff discontinued his payments on account, what was the legal position of the defendants? If it be assumed that they might, at their option, either reclaim the goods as their own property, without any obligation to account for their proceeds or value to the plaintiff, or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaimed their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby affirm it as a sale.

Two inconsistent courses being open to them, they must elect which they would pursue; and, electing one, they are debarred from the other. Reclaiming the goods would show an election to forego the right to recover the price. But, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, entered their action in court, and he was defaulted. They were thereupon entitled to judgment against him. Under this state of things, the action was continued to a later term of court, and after the lapse of several months, and after the commencement of the second subsequent term of court, the defendants, without discontinuing their action, or giving any notice to Bailey of an intention to abandon that remedy, took possession of the goods; and, after this had been done, they proceeded in their action to judgment, and took out execution, upon which they collected a small sum from the trustee. They had thus made a decisive election to treat the transaction as a sale, before reclaiming the goods; and, under such an election, the title passed to Bailey. Butler v. Hildreth, 5 Metc. 49; Arnold v. Richmond Iron Works, 1 Gray, 434, 440; Herryford v. Davis, 102 U. S. 235, 246, 26 L. Ed. 160.

For these reasons, a majority of the court is of opinion that there must be judgment for the plaintiff.

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## HAYNES et al. v. TEMPLE.

(Supreme Judicial Court of Massachusetts, 1908. 198 Mass. 372, 84 N. E. 467.)

Tort for the conversion of two horses. Writ in the Superior Court for the county of Middlesex, dated December 10, 1906.

There was a trial before Lawton, J. It appeared that possession of the horses in question had been delivered to the plaintiffs by the defendant under the agreement of conditional sale described in the opinion, that the plaintiffs had defaulted in the payment of the first two of the three notes given by them to the defendant, that the defendant had recovered judgment thereon, which had been satisfied, and then, the plaintiffs not paying the third note, had taken possession of the horses, which was the conversion complained of.

The presiding judge refused to direct a verdict for the defendant but ruled "that the defendant was liable on the evidence and that the only thing for the jury to do was to assess the damages." There was a verdict accordingly for the plaintiffs, and, the defendant excepting, the presiding judge by agreement of the parties reported the case for consideration by this court.

HAMMOND, J. The price to be paid for the horses was $400, of which $200 was to be paid in one month, $100 in two months, and $100 in three months from August 22, 1904; and three notes for these respective sums were given. To each note was attached a statement that the horses were "to be and remain the entire and absolute property of * * * [the defendant] * * * until said note is fully paid, * * * with interest."

It is argued by the plaintiffs that upon the payment of either of these notes the title to the horses was to pass to the plaintiffs. But this position is untenable. The delivery of the horses by the seller and the giving of the notes by the buyer were all one transaction; and it is too plain for argument that the intention of the parties, as shown by the papers, was that the title was not to pass until all of the notes were paid, and such was the legal effect of the transaction. Before the third note became due the defendant brought suit on the two which were overdue, and, having recovered judgment, collected the amounts due thereon by a levy upon real estate of the plaintiffs.

The question on this branch of the case is whether his action in doing this is inconsistent with his right to insist that the title to the horses still remains in him. Plainly it is not inconsistent. This is not a case where the seller having, by reason of fraud or otherwise, a right either to take back the goods or sue for the entire price which is due and payable only upon the theory that the title has passed to the buyer, elects to consider the transaction a complete sale and sues for the price. In such a case, the suit for the entire price being inconsistent with the theory that the sale is not absolute, the seller is estopped to set up the claim that the goods remain his property. He cannot have both the price and the goods, and having made his election he must stand by it. Butler v. Hildreth, 5 Metc. 49. Whitney v. Abbott, 191 Mass. 59, 77 N. E. 524. See, also, the opinion delivered by Wells, J., in Connihan v. Thompson, 111 Mass. 270.

But this principle is not applicable to the facts shown in the case at bar. Under the contract the defendant at the end of the first month was to receive $200, and at the end of the second month $100 additional, making $300 in all. And these sums he was entitled to receive whether the title to the goods passed to the plaintiffs or not. Even if the plaintiffs had voluntarily paid these two notes at maturity, still the title to the horses would not thereby have become vested in them but would have remained in the defendant until the payment of the third note. His conduct therefore in enforcing by an action at law the payment of the two notes was not inconsistent with the position that the title to the horses was not yet in the plaintiffs. It was his right under the terms of the contract to have the $300 and still to keep his title until the last note was paid. His act in bringing the suit was not an election between two inconsistent remedies, but was an act perfectly consistent with his claim to retain his title, and all in strict compliance with the contract. He still holds the third note unpaid, and hence by the very terms of the contract he still is the owner of the horses; and, the note being overdue, he has the right of possession. The judge erred in refusing to rule as requested by the defendant, and also in directing the jury that the defendant was liable. Coggill v. Hartford & New Haven R. Co., 3 Gray, 545, and cases therein cited.

Verdict set aside.

## THOMASON et al. v. LEWIS.

(Supreme Court of Alabama, 1894. 103 Ala. 426, 15 South. 830.)

Coleman, J.[7] The action is in trover, and was brought by E. M. Lewis for the use of Matthews & Whiteside. The defendants interposed a demurrer to the complaint, and, the demurrer having been overruled, pleaded substantially the following facts, by special pleas in defense of the action: E. M. Lewis sold conditionally to Ellis & Strong the personal property the subject of the present litigation. Ellis & Strong mortgaged the same, and upon its foreclosure the appellants became the purchaser. Ellis & Strong executed their several promissory notes to E. M. Lewis for the purchase money, the vendor retaining the legal title in himself until the payment of the purchase money. E. M. Lewis, the vendor, transferred the unpaid notes to Matthews & Whiteside, he agreeing to retain the title to the property for their benefit and protection. Matthews & Whiteside sued the notes to judgment, but the judgment has not been paid. Thomason et al. refused to surrender the property, and the present action was instituted by Lewis for the use of Matthews & Whiteside. Upon demurrer the pleas were held insufficient. The case is brought up under the special act establishing the Anniston city court.

The proposition of law asserted by the appellants is that the transfer of the notes to Matthews & Whiteside, and their suit upon the notes, converted the conditional sale into an absolute sale of the property to Ellis & Strong; that Lewis had the election, upon a failure to pay the notes at maturity, to retake possession of the property, or to pursue the collection of the debt, but could not pursue both remedies, and, having elected one, he thereby waived or lost the right to pursue the other. We do not understand this to be the law in regard to conditional sales of the character of the one under consideration. No doubt, if the plaintiffs recover in the present action, the title to the property will vest in the purchaser, and the debt contracted for the purchase money will be thereby extinguished;

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[7] The statement of facts is omitted.

and it is equally true that, if the purchase money for the property had been paid, the vendor's title would have passed to the purchasers, and this whether voluntarily paid, or forced by legal process.

It is also the law, as applicable to the present case, and the respective rights of the parties, that if the plaintiffs, by attachment or execution on their judgment, had levied upon the property in question as the property of the defendant debtor, or by any other unequivocal act had recognized the property as belonging to the debtor, such conduct would amount to an election to abandon or waive their claim as the legal owners, and to proceed against it as the property of the vendee. The law will not permit a vendor who retains the legal title to property to have it sold as the property of the debtor, and get the benefit of such sale, and then claim it as his own. Such claims are inconsistent and unjust. These are the principles declared by this court, and they have gone no further. Lehman, Durr & Co. v. Van Winkle, 92 Ala. 443, 8 South. 870; Engine Co. v. Hall, 89 Ala. 628, 7 South. 187; Dowdell v. Lumber Co., 84 Ala. 316, 4 South. 31; Iron Works v. Smith, 98 Ala. 644, 13 South. 525.

It does not appear from the complaint, neither is any fact averred in the pleas which tends to show a waiver on the part of the vendor or his transferees of the legal title reserved at the time of the sale. The mortgage executed by Ellis & Strong conveyed no greater interest than they owned, and the purchaser under the mortgage bought the property subject to plaintiff's legal title. Weinstein v. Freyer, 93 Ala. 257, 9 South. 285, 12 L. R. A. 700.

There is no error in the record. Affirmed.

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## MINNEAPOLIS HARVESTER WORKS v. HALLY.

(Supreme Court of Minnesota. 1881. 27 Minn. 495, 8 N. W. 597.)

BERRY, J.[8] This action is brought upon the following instrument:

"$240. Belle Plaine, Minn., October 5, 1878.

"On or before the first day of September, 1879, for value received in two M. L. reapers, I promise to pay, to the order of the Minneapolis Harvester Works, $240, at the office of Minneapolis Harvester Works, in Minneapolis, Minnesota, with interest at the rate of 12 per cent. per annum from date until paid; agreed, that if paid at maturity, (or within 30 days thereafter,) then the interest shall be nothing. And I further agree, in consideration of the credit herein given, that if this note is not paid when due, and suit is brought thereon, I will pay five dollars additional on the amount then due for attorney's fees, and the same may be included in the judgment. And I further agree to pay all other reasonable expenses incurred in collecting this note.

"The express condition of the sale and purchase of the machine for which this note is given is such that the title, ownership, or right of possession does not pass from the said Minneapolis Harvester Works until this note and interest is paid in full. And the said Minneapolis Harvester Works, or their authorized agents, are hereby fully authorized and empowered to proceed to collect the same at any time they may reasonably deem themselves insecure, even before the maturity thereof, and may take possession of said machine, sell the same, and apply the proceeds towards the payment of this note, after paying all costs and necessary expenses; also this note to become due upon the removal of its maker from the county wherein he now resides. This note may be paid in good farmers' notes, taken and indorsed according to contract. M. Hally.

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[8] The statement of facts is omitted.

"P. O., Belle Plaine, County of Scott, State of Minn.

"Witness: P. B. Nettleton."

The expressed consideration of the instrument is "value received in two M. L. reapers." It is expressly conditioned in the same "that the title, ownership, or right of possession" of the machines "does not pass from the said Minneapolis Harvester Works until this note and interest is paid in full." It appears from undisputed evidence on both sides that the machines have been taken from the possession of the defendant by the plaintiff and sold. This fact we understand to be also substantially alleged in the complaint. The result is that there is a total failure of the consideration expressed in the instrument. The case is one of a conditional sale; that is to say, of a transaction which was to take effect as a sale, so as to pass the title of the reapers and the right of possession upon payment therefor, and not otherwise. The defendant not only never acquired any "title, ownership, or right of possession of the machines," but he has by the act of the plaintiff been deprived of the power of acquiring any by paying the price specified in the instrument.

The case is similar to Third Nat. Bank v. Armstrong, 25 Minn. 530, where it is said that "the promise of payment and the implied obligation to transfer the title were mutual, and as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that inability or refusal to perform the one would excuse performance as to the other." Whatever remedy, therefore, the plaintiffs may have in the premises, this action, which is brought upon the instrument mentioned to recover the price thereon agreed to be paid by the defendant for the machines, cannot be maintained.

The verdict was, therefore, right, and the order denying a new trial is accordingly affirmed.[9]

[9] In Aultman & Co. v. Olson, 43 Minn. 409, 45 N. W. 852 (1890), Mitchell, J., said: "The instruments declared on are not, in legal import, distinguishable from the one considered in Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597 (1881), in which it was held that, the property which

## DEDERICK v. WOLFE.

(Supreme Court of Mississippi, 1891. 68 Miss. 500, 9 South. 350, 24 Am. St. Rep. 283.)

Appeal from circuit court, Hinds county; J. B. Chrisman, Judge.

Dederick sold to Wolfe a hay-press for the sum of $450, taking in payment therefor three notes, of $150 each, payable at several future dates, the title to the press being retained in Dederick till all notes were paid. Two of the notes were paid, but default was made as to the last note, when under the contract of sale the press was advertised and sold, and Dederick became the purchaser, but at a price that still left a balance due on the last note, on which he brings this suit against Wolfe, the maker, for such balance. Judgment was rendered in favor of Wolfe, from which Dederick appealed.

Campbell, J. By the writing sued on the makers obligated themselves to pay the sum stipulated, absolutely and at all events, and were to have the possession and use of the article named until full payment of the price, or until deprived of it by the act of Dederick for his own security, the title remaining in him until full payment of the agreed price; and any payment made before resumption of possession should be considered as payment for use, but nothing "shall constitute a defense or offset, or delay prompt payment of this note in full at maturity." The manifest purpose of the parties was to secure the press to the buyer, and the stipulated price to the seller, and hence the transfer for use of the press, and the retention of title in the seller until paid for. The transaction was plainly a sale, with reservation of title as security for the price, and resorting to the press as means of se-

was the expressed consideration for the instrument having been taken from the possession of the defendant by the plaintiff and sold, there was a total failure of consideration, and therefore an action on the instrument for the price of the property could not be maintained. This proceeded upon the theory that the contract was a mere conditional sale, or rather an executory contract for a sale on condition, and that, the plaintiff having elected to take back the property and treat his title as unconditional, the defendant could not be required to pay for it. It seems to have been considered that the case was analogous to, if not controlled by, that of Third Nat. Bank v. Armstrong, 25 Minn. 530 (1879). A comparison of the instruments in the two cases, however, will show that there was room for a distinction, and for argument that, while one constituted a conditional sale, the other was a mortgage. But, even if there be doubt as to the correctness of the decision in Minneapolis Harvester Works v. Hally, we are not now inclined to overrule it. It has become, in a sense, a rule of property, and is supported by authority elsewhere."

Compare Brooks v. Beirnstein, 1 K. B. 98 (1909), where it was held that, under a contract of hiring with an option of purchase the owner, by retaking possession upon the hirer's default, had not abandoned the right to sue for arrears of rent. "If," said Bigham, J., "the agreement is nothing but an agreement for hiring plus an option to purchase, how has the accrued right of action for the rent been got rid of? If it could be said that by taking away the goods the owners had deprived the hirer of all consideration for the rent, then I could understand that the accrued cause of action would be gone. But in truth the hirer has enjoyed the use of the furniture which was the consideration for the rent, and I can see no reason why he should not be liable to pay the arrears claimed."

curing payment of the note was in pursuance of the contract, and did not preclude a recovery on the note, which, by its terms and the superadded stipulations, was to be paid at all events, and without any defense.

The case of Bailey v. Hervey, 135 Mass. 172, relied on by counsel for the appellees, rests on the assumption that the seller was not entitled to the goods sold and full pay for them; and, as he had seized the things sold and converted them to his own use, he had made an election between inconsistent things, and was bound by this election. In the case before us the seller merely resorted to the thing sold to make it available as a security for the note due and unpaid. He did not claim the right to the press, and the money too, but to make what he could by a sale of the press at public outcry after due notice, and hold the makers of the contract to pay the balance. Dederick did not, by his course, elect to abandon his right to recover on the promise to pay, nor did he do anything inconsistent with a claim for the performance of that promise. The title was retained by the seller for the very purpose of being made available to the payment of the money promised, and it would be a strange result if the exercise of his undoubted right by the seller, as stipulated for by the buyer, should preclude a recovery on the promise, which by its terms was to admit of no defense.

It is true it was stipulated that any payment made should be considered as "payment for use," but it was also stipulated that no "cause shall constitute a defense" of the promise to pay the money; and the proposition that Dederick, by taking possession of the press to make it available as security, surrendered or abandoned or lost his right to go for the money still due, is not maintainable. It rests on the view that the contract was really a mere hiring for use, and that the seller could end it by taking possession of the press at any time, and treat any payment he had received as hire or rent; and this view would be maintainable, if regard be had to a single stipulation of the contract; but, "in determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties." Hervey v. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; and see Heryford v. Davis, 102 U. S. 235, 26 L. Ed. 160, in which latter case the court dealt with a contract substantially like the one before us, and took the same view of its effect as we do of this.

The cases supporting our view are numerous. Many are referred to in 3 Amer. & Eng. Enc. Law, 426. Our own are decisive in its favor. Duke v. Shackleford, 56 Miss. 552; Burnley v. Tufts, 66 Miss. 48, 5 South. 627, 14 Am. St. Rep. 540. It would be a most unreasonable interpretation of the contract to hold that Dederick's taking possession of the press was an abandonment of his claim to be paid what had been promised, and not paid. There is no express provision to that effect, and to give such effect to Dederick's act is to cause a forfeiture of his right to be paid in full, at all events, as promised by the buyer; while the other view does justice to both parties, according to their contract, by allowing the seller what he was promised, and the buyer what was purchased, and treating the press, as it was intended to be, as a security for the payment of the stipulated price.

Reversed and remanded for a new trial.

## MILLER et al. v. STEEN et al.

(Supreme Court of California, 1866. 30 Cal. 402, 89 Am. Dec. 124.)

Appeal from the District Court, Fourth Judicial District, City and County of San Francisco.

The defendants entered into the following contract with the plaintiffs:

"This indenture, made the eighteenth day of June, in the year of our Lord eighteen hundred and sixty-three, betweēn Edward T. Steen, of the City of San Francisco, State of California, party of the first part, and J. F. Miller, W. C. Coley and George H. Harrison, of the City of San Francisco, State of California, party hereunto of the second part, Witnesseth: That the said party of the first part does hereby lease, demise and let unto the said party of the second part the following described property, goods, and chattels, being the property of Edward T. Steen, of San Francisco, State of California, now situate, lying, and being in the shop occupied by said Steen, at No. 35 Fremont street, in the City of San Francisco, in the County of San Francisco; that is to say, one steam engine, 8 inches bore by 16 inches stroke, with link motion, fly wheel, shaft, etc., complete; one steam boiler three feet diameter by eighteen 8–12 feet long, with two twelve-inch flues, chimney, grate bars, fire front, cocks, valves, Giffard's injector and all the appurtenances belonging therewith; one hoisting drum, gears and shaft complete; two shrieves for rope to run over in hoisting from shaft; ten of the largest pieces of said machinery being stamped "E. T. Steen." Said machinery shall not be removed more than twelve miles from the City Hall in San Francisco, without the written consent of the first party or his assigns, and shall not be made a part of the realty of any party or person whatever.

"To have and to hold the premises above described unto the said party of the second part, their executors and administrators, for the term of four months from the 27th day of June, 1863, to the 27th day of October, 1863, yielding and paying therefor the rent in advance of one thousand ($1,000) dollars for the first month, two hundred ($200) dollars for the second month, two hundred and fifty ($250) dollars for the third month, two hundred and sixty-five ($265) dollars for the fourth month, and three hundred and thirty-five ($335) dollars for the fifth month, all payable in United States gold coin.

"And the said party of the second part does for their executors and administrators, covenant, promise and agree to and with the said party of the first part, his executors, administrators and assigns, in manner and form following: That is to say, that they will well and truly pay the said rent in the manner and at the time above provided, and will surrender and deliver the said goods and chattels to the lessor, or his attorney, peaceably and quietly, at the end of the term, in as good order and condition (reasonable use and wearing thereof excepted) as the same are now or may be put into; and to pay the rent as above stated during the term specified, and not make or suffer any waste thereof, nor lease, nor underlet, nor permit any other person or persons to occupy or use the same, or make or suffer to be made any alteration therein, but with the approbation of the lessor or his assigns thereto in writing having been first obtained, and that the lessor or his assigns, may enter the house or premises where the same at any time are, to view the same, and if the lessee shall fail to pay the rent as aforesaid, or make or suffer any injury or waste thereof, or fail to deliver the same to the lessee at the end of the term, the lessor, or his agent, attorney or assigns may enter any place where said property is and take possession of the same and remove it using all such force as is necessary for the purpose without being liable to any action therefor. And should default be made in the payment of any portion of said rent when due and should the same remain unpaid for three days thereafter, the said lessor, his agent, attorney or assigns may enter into any place or store where said goods and chattels are and with such force as aforesaid, take possession thereof, and at option terminate this lease, which is hereby made assignable by the first party.

"It is stipulated and agreed that if the above described rents are fully paid as specified, in United States gold coin, all the machinery, boiler, etc., therein described, or in any way belonging, or connected therewith, shall be and become the property of the second party without further consideration or payment to the first party, or his assigns.

"In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written."

The commencement of the lease was subsequently changed to the 3d of July, 1863, thus making it expire November 3, 1863. The plaintiffs took the engine to San Mateo county, and used it in mining. About the 1st of October, 1863, the defendants went to the mine and took away the engine, and carried it to San Francisco. The plaintiffs sought in this action to recover judgment for a return of the property, or if return could not be had, for twelve hundred dollars, the amount of purchase money they had paid, and for damages. The defendants recovered judgment, and the plaintiffs appealed.

The other facts are stated in the opinion of the Court.

Sawyer, J. The contract in question was substantially a contract of sale. Such must be the legal construction upon the face of the instrument evidencing the agreement. The parties call it a lease, but such is not the legal effect. There were certain stipulations, intended, doubtless, as security for the payment of the purchase money, among them, for a right to retake possession in case of default in any of the payments, and an option in the vendor to terminate the contract. One thousand dollars were paid on delivery of the property (a steam engine, etc.), and the first monthly instalment of two hundred dollars was paid when due; but there was a default in the payment of the second and third monthly instalments, which fell due on the 3d of September and 3d of October, respectively. More than three days having elapsed after the October payment fell due, the vendor, upon the ninth of that month, in pursuance of the stipulations of the contract, took possession of, and removed the property. On the 3d of November, the last instalment of three hundred thirty-five dollars fell due, and, on that day plaintiffs tendered the full amount due, including the two preceding payments, and demanded the property.

We think the District Court erred in holding time to be of the essence of the contract, and the judgment based upon that idea is, therefore, erroneous. There is nothing in the agreement to show that the parties contemplated, that, upon default in any one of the payments, the vendors should have the property and the money already paid by the vendees. There must be something in the contract clearly indicating such an intention to justify the supposition, that time is of the essence of the contract, and that, in default of payment of one instalment, all prior payments are to be forfeited. The rule in this class of agreements is indicated in Gibbs v. Champion, 3 Ohio, 336; Decamp v. Feay, 5 Serg. & R. (Pa.) 323, 9 Am. Dec. 372; Gillet v. Maynard, 5 Johns. (N. Y.) 87, 4 Am. Dec. 329; Raymond v. Bearnard, 12 Johns. (N. Y.) 275, 7 Am. Dec. 317.

Admitting that the vendor was authorized to retake the property upon default and hold it for his security, still—unless the contract was rescinded—upon the full payment of the price it would become the property of the vendees. There is also, it is true, a stipulation that the vendor might "at option terminate the lease." This, if it means anything more than to terminate the possession for the time being, is something in addition to retaking possession of the property, and may, perhaps, be construed into a right to rescind the contract. If so, then the vendor might take the property and have it sold in a proper proceeding to pay the balance due him, or he might take possession, and at the same time rescind the contract. But this involves no forfeiture of the amount paid, for to rescind the contract it would be necessary to return the twelve hundred dollars already received. The party rescinding must put the other party in statu quo. To rescind a contract is to annul it, and claim nothing under it. In this case the vendor does not appear to have rescinded, but to have claimed both the property, and the money already paid in pursuance of it. This he cannot do. If the contract has been rescinded, the plaintiffs are entitled to recover the money paid. If the contract was not rescinded, the vendees became entitled to the possession upon payment of the full amount due.

We have assumed that a tender was made, because the evidence shows that fact, although it is not one of the facts found by the Court. Upon the view taken by the Court, a finding upon that point was not regarded as material. There was an exception for want of a finding on this point, although not strictly in proper form. A party requiring a finding upon a particular point should specify the point without dictating the terms of the finding. In this case, for instance, the appellants should have requested the Court to find, whether a tender of the amount due had been made, and when, etc. Hidden v. Jordan, 28 Cal. 304, 305.

The judgment must be reversed and a new trial had, and it is so ordered.

## DUKE et al. v. SHACKLEFORD.

(Supreme Court of Mississippi, 1879. 56 Miss. 552.)

On December 7, 1876, W C. Shackleford sold to Mary C. Dellahite an engine, boiler, saw, and gearing, for $725, of which $500 was paid cash, and for the balance the following note given:

"$225. On or before the 1st day of January, 1878, I promise to pay W. C. Shackleford, or bearer, two hundred and twenty-five dollars, bearing 10 per cent interest after maturity; being balance due on engine, boiler, cut-off saw, and gearing sold me this day by the said W. C. Shackleford; title to said machinery being retained by the said Shackleford until the amount is paid in full.

"It is expressly understood that said machinery is to be moved and put up near Garner's Station, on the M. & T. R. R.

"Mary C. Dellahite.

"Coffeeville, Miss., Decr. 7, 1876."

The machinery was put up at Garner's Station. The note was not paid at maturity; and Shackleford, without tendering the $500, brought replevin for the property. The land on which the sawmill stood was sold to the Dukes, before the suit was brought, who purchased with notice of Shackleford's rights, and so the suit was against them; and they bring up the case from a judgment for the recovery of the machinery.

CHALMERS, J.[10] By the terms of the written contract, the title of the property remained in the vendor until payment in full of the note given for the deferred payment. The effect of the contract, therefore, was to leave the right of property in the seller, and to give the right of possession, until default made in payment, to the purchaser. Coupled with this right of possession was also the right in the purchaser to obtain title by payment of the price. But the period of payment having arrived, and default having been made, his right of possession terminated, and the vendor, who had all the while remained owner, became entitled to reclaim the custody of his property. In order to assert this right, it was only necessary for him to make demand for the restoration of the property or payment of the price; and this he did. It was not necessary that he should pay back, or tender the money received as the cash payment. This is only necessary in cases of disaffirmance and rescission of a sale on condition subsequent.

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[10] Part of the opinion is omitted.

But this was a sale on condition precedent; that is, there was to be no sale, properly so called, no change of title, until the full price should be paid; and the law annexes to such a sale a right in the seller to recover possession of his property upon default made, even against subsequent bona fide purchasers for value without notice. In reclaiming his property, therefore, the seller is not rescinding the contract, but is enforcing it; and hence there is no obligation to tender back anything. He is simply asserting his legal rights, in strict accordance with the express stipulations of the contract. What rights, if any, the vendee in such a contract might have in a court of chancery is not before us. Ketchum & Cummings v. Brennan, 53 Miss. 597; Story on Sales (3d Ed.) § 313, and note 2; Benj. on Sales (Perkin's Ed.) § 320, and note; Baker v. Hall, 15 Iowa, 277; Dunbar v. Rawles, 28 Ind. 225, 92 Am. Dec. 311; Sumner v. McFarlan, 15 Kan. 600; Zuchtmann v. Roberts, 109 Mass. 53, 12 Am. Rep. 663; Sage v. Sleutz, 23 Ohio St. 1; Little v. Paige, 44 Mo. 412; Duncan v. Stone, 45 Vt. 118; Davis v. Emery, 11 N. H. 230; Bauendahl v. Horr, 7 Blatchf. 548, Fed. Cas. No. 1,113; West v. Bolton, 4 Vt. 558.

The cases specially cited are all cases where partial payments had been made. * * * Affirmed.

## HAYS v. JORDAN et al.

(Supreme Court of Georgia, 1890. 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373.)

SIMMONS, J.[11] Jordan & Co. sued Mrs. Sudie Hays in bail trover for an "Opera piano," alleged to be of the value of $350, and also, in the same action, sued her upon an alleged indebtedness for $35 attorney's fees. The piano was seized by the sheriff, and, Mrs. Hays having failed to give the bond required by law to retain the same, the plaintiffs gave bond, and took possession of the piano. Mrs. Hays filed three pleas: * * * (3) The third was an equitable plea, in which she alleged that she gave to the plaintiffs her notes for the $350, bearing date August 4, 1888, one being for $100, due October 1, 1888, one for $150, due December 1, 1888, and one for $100, due February 1, 1889, and that she paid the first note when it fell due; but, upon ascertaining that the piano did not come up to the warranty, she offered to return it to the plaintiffs if they would return the money she had paid thereon; and that they refused to do this. She prayed that, as they had elected to take a verdict for the return of the piano itself instead of a verdict for damages, she might have a judgment against them for the $100 which she had paid upon the piano. Upon the trial, the jury, under the charge of the court, returned a verdict in favor of the plaintiffs for the piano. The defendant made a motion for a new trial on the several grounds therein set forth, which was overruled, and she excepted. * * *

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[11] Part of the opinion is omitted.

The contract being then a conditional sale, and not a lease, and the payments made thereunder not rent but purchase money, the plaintiffs have no right to retain them as rent; and there is no express stipulation that they shall be treated as a forfeiture. "Forfeitures are abhorred in equity, and are never favored in law," and provisions for forfeitures are regarded with disfavor, and construed with strictness when applied to contracts, and the forfeiture relates to a matter admitting of compensation or restoration. Where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. The law inclines to remedy breach of condition by damages rather than by forfeiture. Code, § 2295; Story, Eq. Jur. §§ 1312, 1314, 1316, et seq. "On a sale reserving title till the price is paid, many of the cases hold that partial payments are forfeited on default of the residue; but in courts possessing equity powers the modern tendency is to allow the seller who rescinds a contract for default after receiving a part of the price to retain only so much as will compensate him." Newm. Sales, § 306; Preston v. Whitney, 23 Mich. 260, 267; Johnston v. Whittemore, 27 Mich. 463, 470.

In this case, under the practice in this state, it was within the power of the court to mould the verdict so as to do full justice to the parties, and in the same manner as a decree in equity. Code, §§ 3082, 3562; Acts 1884–85, p. 36; Acts 1887, p. 64. Although the plaintiffs elected to take the piano, and not to take a money verdict for damages, as they had a right to do under section 3564 of the Code, yet we do not think that they were entitled to recover the piano and retain all the money received from the defendant. We think that under our law the court should have instructed the jury to so mould their verdict as to do justice to all parties, and should have instructed them that if the plaintiffs elected to take the specific property, and a part of the purchase money had been paid, the plaintiffs were entitled to recover the property itself; but before they could recover they must return the money which the defendant had paid them, after deducting a proper amount for the use of the piano, if the use was of any value to the defendant, which amount the jury should arrive at from the evidence, finding the balance, with interest, in favor of the defendant against the plaintiffs, the piano to be returned to the plaintiffs upon payment to the defendant of the amount thus found. Where the plaintiff obtains possession of the piano by bail process, as was done in this case, the court can enter judgment for the amount found for the defendant upon the plaintiff's bond.

The ruling here made is not in conflict with that in the case of Guilford v. McKinley, 61 Ga. 230. In that case the plaintiffs elected to take a money verdict for the damages, and not a verdict for the property. This court held that they could recover the balance of the purchase money, after deducting what had been paid, and damages for breach of warranty. When the court said in the latter part of the opinion in that case that "the plaintiffs had the right to recover it unless the balance of the price be paid," the court meant that the plaintiffs had the right to recover the balance of the purchase money after deducting what had been paid, and after deducting damages arising from defects in the piano, because the court adds: "Which payment may be in money, or by showing that the piano was a faulty instrument, and that the plaintiff had got all it was worth, owing to its defects."

Judgment reversed.[12]

## RAYFIELD v. VAN METER. (S. F. 762.)

(Supreme Court of California, 1898. 120 Cal. 416, 52 Pac. 666.)

BRITT, C. On September 4, 1890, the parties to this action entered into a contract in writing whereby plaintiff covenanted to sell to defendant certain household furniture at the price of $1,830, of which price the sum of $1,000 was then paid, and the residue was to be paid on or before September 4, 1891; plaintiff to give a bill of sale of the furniture on receiving such deferred payment. Defendant received immediate possession of the goods, but agreed on his part that, if he failed to pay the said balance, he would restore such possession to plaintiff on demand. In due time, plaintiff tendered to defendant a bill of sale, and demanded payment of the said balance of $830. He refused payment, and refused to restore the goods.

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[12] In A. D. Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682 (1893), which was an action of claims and delivery to recover a soda water machine, it appeared that the contract provided that there should be paid as "rent" $330 in installments, that there was $70 due on the machine, and that the buyer had sustained $26 damage by reason of a breach by the seller. The lower court entered judgment for the plaintiff, but the Supreme Court directed that "the judgment below should be modified by permitting the defendant, in a reasonable time, to pay the sum found to be due plaintiff, after deducting the counterclaim from the balance remaining unpaid of the purchase money, with interest, and, if not then paid, a sale of foreclosure to pay off such balance and the costs of the action, the residue, if any, to be paid to the defendant."

On November 6, 1891, plaintiff brought this action to recover said goods, and obtained possession thereof by process of claim and delivery. In a cross-complaint, defendant alleged that he entered into said contract under the influence of fraud, and also duress, practiced by plaintiff, that she had replevied the property, and that the consideration for his promise to pay said balance had failed. He prayed that he recover the sum of $1,000 already paid, less such compensation to plaintiff for the use of the goods as justice might require. In August, 1893, plaintiff began selling the property piece by piece, and so disposed of the whole of it; this for the reason, testified by her, that "the storage charges were very large, and the property was continually deteriorating in value." The trial was had in August, 1895. The findings negatived defendant's allegations respecting fraud and duress, and declared the right of plaintiff to possession of the goods at the commencement of the action. The facts concerning the replevin and subsequent sale of the goods by plaintiff were found; and the court decided, as the net result, that by selling the goods after she had replevied them the plaintiff rescinded her contract with defendant, and that he was entitled to recover of her his payment of $1,000, less the value of the use of the goods during the time they were in his possession, fixed at $420; he being allowed also interest on the excess of said payment above such rental.

There was no supplemental pleading to raise the question on which the case was made to turn, viz., the effect of the sale of the goods by plaintiff after she had regained possession of them, but, as appellant makes no point on the procedure, we shall consider it as one properly presented by the record. The defendant himself put an end to the contract, if plaintiff chose to so regard it. "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation to abandon, and altogether to refuse performance of, the contract." Lord Coleridge, C. J., in Freeth v. Burr, L. R. 9 C. P. 213. Perhaps the language of the eminent chief justice was hardly sufficiently stringent in allowing that a mere intimation of such intention may dissolve a contract, but it is apparent that in this case the defendant's purpose to refuse performance was distinctly and unequivocally evinced. His refusal to pay the deferred installment of purchase money was continued for nearly two years before plaintiff, having lawfully regained possession of the goods, made sale of them, and by his pleading in the action he repudiated any further obligation under the contract, in which respects, as the findings of the court show, his conduct was without lawful justification. By these acts the vinculum juris arising from the contract was broken, and there was nothing which plaintiff needed to rescind.

A buyer who without lawful excuse refuses to go forward with his contract is not entitled to recover back money paid on account thereof. Bradford v. Parkhurst, 96 Cal. 102, 30 Pac. 1106, 31 Am. St. Rep. 189; Hansbrough v. Peck, 5 Wall. 497, 18 L. Ed. 520. Those were cases of sales of lands, but the principle has at least as extensive application to agreements for sale of personalty. Tied. Sales, § 210;; 2 Schouler, Pers. Prop. § 298; Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27, 29. It is immaterial that plaintiff sold the goods. In Ketchum v. Evertson, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384, an action for money paid on a contract for the conveyance of land, it was justly and forcibly remarked: "To say that the subsequent sale of the land gives a right to the plaintiff to recover back the money paid on the contract would, in effect, be saying that the defendant could never sell it without subjecting himself to an action by the plaintiffs. Why should he not sell? The plaintiffs renounced the contract, and peremptorily refused to fulfill it. It was vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell. This would be most unreasonable and unjust, and is not sanctioned by any principle of law." These views are equally appropriate to a case of sale of chattels. Neis v. O'Brien, 12 Wash. 358, 41 Pac. 59, 50 Am. St. Rep. 894.

Defendant here relies somewhat on Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124, where it was said that a seller cannot claim both the property, and the money paid in pursuance of a contract for sale of it. But there the purchasers, so far from refusing performance of the contract or denying its obligation, had come in sufficient season, and tendered the balance unpaid for the goods, and insisted on observance of the contract,—circumstances which make all the difference in cases of this nature. Packer v. Button, 35 Vt. 192–194. See Railroad Co. v. Mudd, 59 Cal. 588, 589.

Section 1749, Civ. Code, provides, "If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller after payment is due, the seller may rescind the sale, or may enforce his lien for the price, in the manner prescribed by the title on liens." Defendant claims, as we understand the argument, that, since plaintiff did not adopt the latter alternative mentioned in section 1749, the law compels her to the first; that is, to rescission, and consequent restoration of the payment she had received. The case, however, is without the scope of that section. There was no sale of the property to defendant,—only an agreement for sale, which was terminated as we have seen. By retaking the property the plaintiff lost the right to compel payment of the balance of the purchase price,—Railroad Co. v. Mudd, 59 Cal. 589;

Benj. Sales (Bennett's 6th Ed.) p. 284,—and had at most but an unliquidated claim for damages for defendant's breach. Hence, firstly, there was no sale requiring rescission, and, secondly, there was no lien requiring enforcement, within the meaning of said section 1749. Gibbs v. Ranard, 86 Cal. 531, 25 Pac. 63; Hewes v. Fruit Co., 106 Cal. 441, 39 Pac. 853; Civ. Code, § 3311.

It is contended that in equity the defendant should recover the sum paid, less a proper compensation for the use had by him of the goods. But the grounds for equitable relief against the contract pleaded by defendant were found against him by the court, and he stands in the position of one who willfully refused to comply with his agreement. It seems to us that there is little equity, and certainly no sound policy, in allowing a buyer, under such circumstances, to be at pleasure quit of his contract, with no other liability than such as the law would have implied had there been no contract of sale at all. No case is made for the interposition of equity. Civ. Code, § 3275; Tied. Sales, § 219; Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702; Hicks v. Lovell, 64 Cal. 20, 21, 27 Pac. 942, 49 Am. Rep. 679; Cf. Thirlby v. Rainbow, 93 Mich. 168, 169, 53 N. W. 159.

The judgment and order appealed from should be reversed.[13]

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[13] See Pfeifer v. Norman (N. D.) 133 N. W. 97, and elaborate note, 38 L. R. A. (N. S.) 891 (1911).

# CHAPTER VII

# REMEDIES OF THE BUYER ON THE CONTRACT

## MONDEL v. STEEL.

(Court of Exchequer, 1841. 8 Mees. & W. 858.)

Parke, B.[1] In this case, the declaration is in special assumpsit on a contract to build a ship for the plaintiff, at a certain rate per ton and according to a certain specification: and the breach assigned is for the building a vessel with scantlings, fastenings, and planking, according to such specification; by reason whereof the ship, on a voyage from London to New South Wales and back, was so much strained that it became necessary to re-fasten and repair her.

To this declaration there was one plea, to which it is unnecessary to allude, as it was admitted to be bad on special demurrer, and it is to be amended; and a second plea, on which the question which we have taken time to consider, arises.

This plea states in substance, that the defendant had sued the plaintiff for the balance of the agreed price of the vessel, after payment of £3500. and also for a sum of £134. odd for extra work, in the form of an action for work and labour, and for goods sold and delivered; that issue was joined, and, on the trial of the cause, the plaintiff gave evidence in his defence of the same breach of contract alleged in the declaration; and insisted, that if the amount of compensation to which he was entitled, exceeded or equalled the balance of the price and the value of the extra work, the now plaintiff was entitled to a verdict; if it was less, that he was entitled to a deduction from the amount of both, of such amount of compensation. The plea proceeds to state, (and, we must assume, correctly, for the purposes of this argument, though the statement has arisen from mistake,) that the learned judge before whom the cause was tried, my Brother Rolfe, so directed the jury; and that the jury found that the now defendant had committed a breach of contract, and was entitled to some compensation, which they deducted from the price of the vessel and value of the extra work; and the now defendant had judgment for the amount, after such deduction had been made, since the commencement of this suit.

The plaintiff demurred to this plea, assigning several causes of special demurrer, which it is not necessary to notice, as we are all of opinion that it is bad in substance.

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[1] The statement of facts is omitted.

The ground on which it was endeavoured to support the plea, in a very ingenious argument, was this: that a defendant in an action for the stipulated price of a chattel, which the plaintiff had contracted to make for the defendant of a particular quality, or of a specific chattel sold with a warranty, and delivered, had the option of setting up a counter claim for breach of the contract in the one instance, or the warranty in the other, in the nature of a cross action; and that if he exercised that option, he was in the same situation as if he had brought such an action; and consequently, could not, after judgment in one action, bring another; and the case was likened to a set-off under the statutes. This argument was founded on no other authority than an expression of Lord Tenterden in giving the judgment of the Court in the case of Street v. Blay, 2 B. & Ald. 22 E. C. L. R. 462, his lordship having said that a breach of warranty might be given in evidence in an action for the price of a specific article sold, in mitigation of damages, "on the principle, it should seem, of avoiding circuity of action." But we are all of opinion that no such inference is to be drawn from that expression; what was meant was, that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value, by reason of the non-compliance with the warranty; and that this abatement was allowed in order to save the necessity of a cross action.

Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side.

But after the case of Basten v. Butter, 7 East, 479, a different practice, which had been partially adopted before in the case of King v. Boston, 7 East, 481, note, began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value; Kist v. Atkinson, 2 Camp. 64; Thornton v. Place, 1 M. & Rob. 218, &c. The same practice has not, however, extended to all cases of work and labour, as for instance that of an attorney, Templer v. McLachlan, 2 T. R. 136, unless no benefit whatever has been derived from it; nor in an action for freight; Shiels v. Davies, 4 Camp. 119.

It is not so easy to reconcile these deviations from the ancient practice with principle, in those particular cases above-mentioned, as it is in those where an executory contract, such as this, is made for a chattel, to be manufactured in a particular manner, or goods to be delivered according to a sample; Germaine v. Burton, 3 Stark. (14 E. C. L. R.) 32; where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases the acceptance or non-return affords evidence of a new contract on a quantum valebat; whereas, in a case of a delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract: and in some cases of work performed, there is difficulty in finding a reason for such presumption.

It must however be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more.

The opinion, therefore, attributed on this record to the learned Judge is, we think, incorrect, and not warranted by law; and all the plaintiff could by law be allowed in diminution of damages, on the former trial, was a deduction from the agreed price, according to the difference, at the time of the delivery, between the ship as she was, and what she ought to have been according to the contract: but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs could not have been allowed in the former action, and may now be recovered.

We have already observed in the course of the argument, that the defence made in the second plea cannot be supported on the ground that it discloses a mutual agreement by the plaintiff and defendant to leave the amount of the cross claim to the jury as arbitrators, and that they have made an award. The plea does not state any such agreement, or an equivalent thereto. Our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

## BERMAN v. HENRY N. CLARK CO.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 248, 80 N. E. 480.)

KNOWLTON, C. J.[2] The defendant made a contract in writing to furnish and put in place specific apparatus for heating three houses belonging to the plaintiff. The contract contained a guaranty as follows: "We guarantee this apparatus to be complete in every way and, when finished, to be capable of warming all rooms in which radiators are placed to 70 degrees in zero weather. We guarantee this apparatus against all imperfections in material and workmanship for one year." This action is brought to recover upon this guaranty.

An earlier action was brought by the defendant company against the plaintiff, to recover the price of this apparatus, and for extra work in connection with the contract. As a defense to this former action, the present plaintiff answered, denying that the plaintiff in that action had fulfilled its contract, and averring that it failed to provide apparatus which complied with the guaranty contained in the contract, in that the apparatus furnished has been and was unable to heat the apartments to 70 degrees in zero weather, etc., and claiming a recoupment of damages. After a trial upon these pleadings, the plaintiff in that action recovered from the present plaintiff the full amount claimed in its declaration. The only question now before us is whether the judgment in the former action is a bar to the present one.

We think it plain that it is. The principles applicable to the case were considered in Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976, in Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482, and in Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509. See, also, Morse v. Elms, 131 Mass. 151. In Gilmore v. Williams it was said of the plaintiff, seeking to recover on a breach of warranty, he having previously set up this breach as a defense to an action upon the note given in consideration of the warranty, "if he chose to plead the breach of warranty in answer to the claim on the note, and if a judgment was entered against him for the whole amount due on the note, or a part of it, on the issue thus raised, the judgment would be a bar to any further claim under the warranty. This would be so whether the judgment was entered by consent of parties, or upon a default after answer, or upon a verdict after trial on the facts. His election to claim his damages by way of recoupment in that suit would be conclusive on him."

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[2] The statement of facts is omitted.

This doctrine is conclusive against the right of the plaintiff to recover in the present case. There is a well recognized distinction, referred to in the cases above cited, between the effect of a judgment pleaded as an estoppel as to facts arising collaterally in another action, and its effect as a final determination of the matters declared on as the cause of action, or set up in the answer as a ground for an allowance in defense.

It is immaterial that there had been no zero weather before the trial of the first action. The capacity of the apparatus was put in issue, and could be shown otherwise than by actual experiment. Evidence was introduced on the subject, and it would have been in the power of the court, upon motion, to continue the case for trial until there was an opportunity for an experiment, if it had been thought advisable to do so.

Judgment on the verdict.

## STREET v. BLAY.

(Court of King's Bench, 1831. 2 Barn. & Ad. 456.)

Lord Tenterden, C. J.[3] We have taken time to consider of this case, and are now of opinion that the rule ought to be made absolute for a new trial, unless the parties can agree to enter a verdict for the plaintiff for a sum less than the full amount.

The facts of the case were these: The plaintiff, on the 2d of February, sold the horse to the defendant for £43, with a warranty of soundness. The defendant took the horse, and on the same day sold it to Bailey for £45. Bailey, on the following day, parted with it in exchange to Osborne; and Osborne, in two or three days afterwards, sold it to the defendant for £30. No warranty appeared to have been given on any of the three last sales. The horse was, in fact, unsound at the time of the first sale; and on the 9th of February the defendant offered to return it to the plaintiff, who refused to accept it. The question for consideration is, whether the defendant, under these circumstances, had a right to return the horse, and thereby exonerate himself from the payment of the whole price?

It is not necessary to decide, whether in any case the purchaser of a specific chattel, who, having had an opportunity of exercising his judgment upon it, has bought it, with a warranty that it is of any particular quality or description, and actually accepted and received it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor, and exonerate himself from the payment of the price, on the ground that he has never received that article which he stipulated to purchase. There is, indeed, authority for that position. Lord Eldon, in the case of Curtis v. Hannay, 3 Esp. N. P. C. 83, is reported to have said, that "he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;" and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This dictum has been adopted in Mr. Starkie's excellent work on the Law of Evidence, part 4, p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid.

It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. Weston v. Downes, 1 Doug. 23, Towers v. Barrett, 1 T. R. 133, Payne v. Whale, 7 East, 274, Power v. Wells, Doug. 24, note, and Emanuel v. Dane, 3 Campb. 299, where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action, Cormack v. Gillis, cited 7 East, 480, King v. Boston, 7 East, 481, note; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideraion for the specific price agreed by the defendant to be paid.

It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial, Okell v. Smith, 1 Stark. N. P. C. 107; nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain specific chattel, accepted and received by the vendee, and the property in which is completely and entirely vested in him.

But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to shew that he may return it where the purchaser has done more than was consistent with the purpose of trial; where he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case; and even supposing it might have been competent for the defendant to return this horse, after having accepted it, and taken it into his possession, if he had never parted with it to another, it appears to us that he cannot do so after the re-sale at a profit.

These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant, that the particular chattel was his own; and it may be added, that the parties cannot be placed in the same situation by the return of it, as if the contract had not been made, for the defendant has derived an intermediate benefit in consequence of the bargain, which he would still retain. But he is entitled to reduce the damages, as he has a right of action against the plaintiff for the breach of warranty. The damages to be recovered in the present action have not been properly ascertained by the jury, and there must be a new trial, unless the parties can agree to reduce the sum for which the verdict is to be entered; and if they do agree, the verdict is to be entered for that sum.

Rule absolute on the above terms.[4]

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## BRYANT v. ISBURGH.

(Supreme Judicial Court of Massachusetts, 1859. 13 Gray, 607, 74 Am. Dec. 655.)

METCALF, J.[5] The precise question in this case is, whether a purchaser of personal property, sold to him with an express warranty, and taken into possession by him, can rescind the contract and return the property, for breach of the warranty, when there is no fraud, and no express agreement that he may do so. It appears from the cases cited for the plaintiff that in the English courts, and in some of the courts in this country, he cannot; and that his only remedy is on the warranty. See, also, 2 Steph. N. P. 1296; Addison on Con. (2d Amer. Ed.) 272; Oliphant's Law of Horses, 88; Cripps v. Smith, 3 Irish Law R. 277.

But we are of opinion (notwithstanding a dictum of Parsons, C. J., in Kimball v. Cunningham, 4 Mass. 505, 3 Am. Dec. 230) that, by the law of this commonwealth, as understood and practised upon for more than forty years, there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter, which he has under the former; and that he to whom property is sold with express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defence to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it have been paid to him. In Bradford v. Manly, 13 Mass. 139, 7 Am. Dec. 122, where it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the kind of thing sold, (and in which case there was no fraud,) Chief Justice Parker said "If a different thing is delivered, he" (the seller) "does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him." This, it is true, was only a dictum, and not to be regarded as a decisive authority. But in Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56, which was an action on a promissory note given for the price of an ox sold to the defendant, it was adjudged that the jury were rightly instructed that if, on the sale of the ox, there was fraud, or an express warranty and a breach of it, the defendant might avoid the contract by returning the ox within a reasonable time, and that this would be a defence to the action. In Dorr v. Fisher, 1 Cush. 274, it was said by Shaw, C. J., that, "to avoid circuity of action a warranty may be treated as a condition subsequent at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud. But if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor; and without this he cannot recover." The chief justice took no distinction between an express warranty and an implied one, but referred, in support of what he had said, (with other cases,) to Perley v. Balch, cited above.

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[4] See, also, Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847 (1857). Where, by the local law, rescission is allowed, the federal courts allow it. See George Lawley & Son Corp. v. Park, 138 Fed. 31, 70 C. C. A. 399 (1905).

[5] The statement of facts is omitted.

In 1816, when the case of Bradford v. Manly was before this court, and afterwards, until 1831, the law of England, on the point raised in the present case was supposed to be as we now hold it to be here. Lord Eldon had said, in Curtis v. Hannay, 3 Esp. R. 82, that he took it to be "clear law;" and so it was laid down in 2 Selw. N. P. (1st Ed.) 586, in 1807, and in Long on Sales, 125, 126, in 1821, and in 2 Stark. Ev. (1st Ed.) 645, in 1825. In 1831, in Street v. Blay, 2 B. & Ad. 461, Lord Eldon's opinion was first denied, and a contrary opinion expressed by the Court of King's Bench. Yet our court subsequently (in 1839) decided the case of Perley v. Balch. The doctrine of that decision prevents circuity of action and multiplicity of suits, and, at the same time, accomplishes all the ends of justice.

Exceptions sustained.

## MILLIKEN v. SKILLINGS.

(Supreme Judicial Court of Maine, 1896. 89 Me. 180, 36 Atl. 77.)

WHITEHOUSE, J.[6] The plaintiff brought this action on account annexed to recover a balance of $310.29 for 355 cases of canned corn, being 710 dozen cans, sold and delivered under the following agreement, signed by him September 4, 1893:

"I do this day agree to sell to Red Brook Packing Co. my sweet corn at $1.00 per doz., warranted to be in good condition, with the conditions:

"1st. To pay for cans $21.00 per M.
"2d. " " " labels $ 2.40 " "
"3d. " " " boxes .09 apiece.
"To be taken out of $1.00 per doz."

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[6] Part of the opinion is omitted.

The defendant filed an account in set-off, amounting to $405.78, for cans, boxes, and labels furnished, and $126.13 in cash paid on account, claiming that the corn received by him was not in good condition as warranted, and had no market value, and, furthermore, that the contract was rescinded by him on account of this breach of warranty of the quality of the goods.

The jury returned a verdict in favor of the defendant for $405.78, the exact amount of the account in set-off. The case comes to the law court on exceptions to the instructions of the presiding justice and a motion to set aside the verdict as against evidence.

It is undoubtedly settled law in this state that a sale of personal property, with a warranty of quality, and without fraud, may be treated as a sale upon condition subsequent, at the election of the purchaser; and, in the event of a breach of the warranty, the property may be returned, and the sale rescinded, since a breach of the warranty may be equally injurious to the buyer whether the vendor acted in good faith or bad faith. Marston v. Knight, 29 Me. 341; Cutler v. Gilbreth, 53 Me. 176; Farrow v. Cochran, 72 Me. 309.

But the right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract. "Where a contract is to be rescinded at all, it must be rescinded in toto," said Lord Ellenborough, "and the parties put in statu quo." Hunt v. Silk, 5 East, 449. See, also, Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Conner v. Henderson, 15 Mass. 319, 8 Am. Dec. 103; Snow v. Alley, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119; Morse v. Brackett, 98 Mass. 205; Marston v. Knight, 29 Me. 341. And this rule, which makes it the duty of a buyer, who would rescind a contract for breach of warranty of quality, to restore the seller substantially to his former position, necessarily requires him to return or tender back to the seller whatever of value to himself or the other he has received under the contract. In Dorr v. Fisher, 1 Cush. (Mass.) 271, Shaw, C. J., says that for breach of warranty the vendee may "rescind the contract, and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover."

The law, however, requires neither impossibilities nor idle and useless ceremonies. So, if the buyer's offer to restore the goods is met by an absolute refusal of the other party to receive them if tendered, he will be relieved of the duty of actually returning or tendering them to the vendor at the place where the title passed.

In Noyes v. Patrick, 58 N. H. 618, the idea is thus expressed: "The party seeking to rescind must ordinarily restore, or offer to restore, whatever he has received under the contract; and, in case of the refusal of the wrongdoer to receive it, an offer to restore properly made, is equivalent to actual restoration." In the discussion of this question the word "offer" is frequently used by courts and text writers as synonymous with "tender," and it may be properly so used with reference to articles capable of manual delivery and actually produced, as, in Luey v. Bundy, 9 N. H. 298, 32 Am. Dec. 359, it was said to be unnecessary to produce the notes and money in court. "He had offered them to the defendant, who refused to receive them." But with respect to heavy articles of merchandise, situated at a distance from the place to which they must be transported if restored to the vendor, the phrase "offer to return" is more commonly and more aptly employed to express a willingness or to make a proposal to rescind the contract and return the goods. It is not sufficient, however, for a buyer, who has taken delivery of the goods at the vendor's place of business, merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. If he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless, upon making the offer so to do, he is relieved of the obligation, as stated, by a refusal to receive them if tendered. Norton v. Young 3 Me. (3 Greenl.) 30; Ayers v. Hewett, 19 Me. 281; Cushman v. Marshall, 21 Me. 122; Stinson v. Walker, 21 Me. 211; Tyler v. City of Augusta, 88 Me. 504, 34 Atl. 406.

The principle controlling the restoration of the status quo in this class of cases is essentially the same as the ordinary rule in regard to the requisites of a valid tender, with respect to which all the authorities agree that there must be an actual production of the money, or its production must be expressly or impliedly waived. Chit. Cont. 1191; Sargent v. Graham, 5 N. H. 440, 22 Am. Dec. 469.

* * *

Upon this evidence the presiding justice instructed the jury as follows: "The plaintiff claims that the corn belonged, and does now, to the defendant. The defendant claims that it belongs to the plaintiff, that he has tendered it back, and offered to return it, and that it belongs to him, the plaintiff. * * * Now, the plaintiff claims that, under all the circumstances, there never has been a rescission of the contract. * * * Now, in the first place, was there an offer here to return these goods? Did the defendant, at the time he states, say to the plaintiff that the goods were not in accordance with the contract, in quality? and did he tender them back to the plaintiff by stating that they were there subject to his order, or words to that effect? There is no set phrase necessary to constitute the rescission of a contract, except that the buyer must offer to return them to the seller on the ground that they were not in accordance with the original arrangement in quality or otherwise. * * * I believe I have now covered these two grounds. * * * If there was an offer to rescind the contract on the ground of a defect in the quality, if done within a reasonable time, it makes no difference whether the seller accepted the offer or not,—whether he takes the goods into his possession or not."

In the first place, there was not sufficient evidence in the case to warrant these instructions. It has been seen that the defendant did not claim that he ever returned or tendered the goods to the plaintiff at his place of business, or that he was relieved from so doing by any refusal of the plaintiff to accept them if tendered there. When the defendant says he told the plaintiff the corn would be of no use to him, and he wanted him to take it back, the plaintiff only made a counter proposition that he would take some sample cans home and see what he could do with them. This was clearly insufficient to constitute a rescission. As stated by Cutting, J., in Hopkins v. Fowler, 39 Me. 568, "the instructions must have been called forth upon an assumption of some testimony to warrant them; and if the assumption was erroneous, the instructions became a superstructure without a foundation, and might have had some tendency to mislead the jury."

In the case at bar there is reasonable ground to apprehend that the jury was misled by the instructions given. The frequent reference in the charge to an "offer to return" the corn, as sufficient to constitute a rescission, necessarily gave the jury the erroneous impression that, if the defendant made the offer which he claimed to have made, without any refusal on the part of the plaintiff, he had done all the law required of him in order to rescind the contract. As the corn and packing cases were of some value to the plaintiff, the jury must have found that the contract was rescinded. This is apparent from the amount of the verdict.

The general principles of law involved in the rescission of contracts had been accurately stated in the earlier part of the charge; but it is the opinion of the court that, in giving the jury the more specific instructions above set forth, the learned justice inadvertently omitted to point out the distinctions and qualifications required by the facts and circumstances disclosed in the evidence.

Exceptions sustained.[7]

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[7] The buyer must exercise his right to rescind without unreasonable delay, and must place the seller substantially in statu quo. Consequently, if the goods, or part of them, are injured, destroyed or disposed of, the right to rescind is lost. Libby v. Haley, 91 Me. 331, 39 Atl. 1004 (1898); Continental Jewelry Co. v. Pugh Bros., 168 Ala. 295, 53 South. 324, Ann. Cas. 1912A, 657 (1910). However, if the injury results from the defect warranted against, the right to rescind is not affected. Smith v. Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485 (1893).

## EYERS et al. v. HADDEM et al.

(Circuit Court of United States, W. D. Wisconsin, 1895. 70 Fed. 648.)

BUNN, District Judge. This is an action brought by the plaintiffs, who are citizens of North Dakota, against the defendants, who are citizens of Wisconsin, upon a warranty in the sale of a stallion. The defendants are importers of blooded horses at Janesville, Wis., and on March 11, 1893, sold to the defendants an imported stallion, by a bill of sale containing the following printed warranty: "We hereby guaranty the above-named horse to be a reasonable foal getter, with proper care and handling. In case he should prove not to be so, we agree to replace him with another horse of same breed and price, upon delivery to us of the above-named horse at our stables without cost to us, if as sound and in as good condition as when purchased of us."

The case was tried before a jury at La Crosse in September, 1895, and a verdict rendered in favor of the plaintiffs for $1,350. The price paid for the stallion was $2,700. The plaintiffs' evidence was directed to show that the horse, instead of being a reasonable foal getter, was what is known among horsemen as a "ridgling," and nearly worthless as a foal getter. The plaintiffs' evidence went to show that during the season of 1893, when the plaintiffs stood him for service, he got only about 10 per cent. of mares served with foal, and that his value was not more than that of a common workhorse, or about $150. After the evidence was in the defendants asked the court to direct a verdict in their favor, on the ground that the evidence showed that plaintiffs did not return the horse according to the conditions of the warranty, and give the defendants the opportunity to replace him with another horse. The court overruled the motion pro forma, reserving the question for further argument upon a motion for a new trial, in case there should be a verdict in favor of the plaintiffs.

That motion has now been heard, and fully argued and considered, and the court is of opinion that it must be overruled. The rule is laid down in 28 Am. & Eng. Enc. Law, 827, as follows: "In a sale of certain classes of articles, the contract of sale frequently specifies the buyer's remedy in case the warranty is not complied with. The buyer is not concluded by such a provision, however, but may waive the special remedy, and proceed as if the contract had been silent in that particular. The special remedy usually allowed in such contracts is the privilege of returning the article, if it proves not to be as warranted, and to receive back the price paid."

And it seems to be fully supported by the authorities. One of the leading and best-considered cases on the subject is that of Manufacturing Co. v. Gardner, 10 Cush. (Mass.) 88. In that case the court, by Metcalf, J., says: "When a seller, in addition to a warranty of property, makes a promise to take it back if it does not conform to the warranty, we cannot hold that such superadded provision rescinds and vacates the contract of warranty. We are of opinion that in such case the buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of the warranty."

The same ruling was made by the supreme court of Connecticut in an opinion by Park, C. J., in Shupe v. Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339. In Perrine v. Serrell, 30 N. J. Law, 454, the action was on a warranty in the sale of a horse, with a provision that if the horse did not suit he might be returned, and the seller would take him back and send one that would suit. The court held that this latter provision was independent of the warranty, and that the purchaser was not obliged to return the horse, but could maintain his action upon the warranty.

In Love v. Ross, recently decided (October, 1893) by the supreme court of Iowa, reported in 89 Iowa, 400, 56 N. W. 529, the contract was for the sale of a stallion, with a warranty that he was a reasonably sure foal getter under favorable circumstances, and in default of which the purchasers could return the stallion to the sellers in as good condition as he was then in, and the sellers would exchange him for another, giving or receiving the actual difference of value in the two animals. In my judgment the case is not distinguishable from the one at bar. It was held that the purchasers had the right to retain the horse and to recover damages for the breach of the warranty, or to return him and receive another horse in exchange upon the terms stated. Hefner v. Haynes, by the same court, decided in 1894, reported in 89 Iowa, 616, 57 N. W. 421, holds to the same rule under a similar warranty in the sale of a stallion.

The supreme court of Minnesota, in Mandel v. Buttles, 21 Minn. 391, and Fitzpatrick v. D. M. Osborne & Co., 50 Minn. 261, 52 N. W. 861, has held the same doctrine, following Manufacturing Co. v. Gardner, supra.

Kemp v. Freeman, 42 Ill. App. 500, was an action upon the following warranty on the sale of a stallion: "We warrant the animal to be sound and healthy, and in every respect an average breeder; and, in case he fails to be an average breeder, we agree to take him back and replace him with another horse of equal value and merits." And the court says: "The transaction between the parties was an unconditional, absolute, and fully-completed sale, with a warranty of the seller superadded. Had there been no condition in the contract by which the appellants bound themselves to take the stallion back in case of a breach of the warranty, the appellee could only have kept the horse and sought damages for the breach. The clause by which the appellants agreed that the horse might be returned if there was a breach of the warranty only operated to give the appellee that privilege, which otherwise he would not have had."

The supreme court of Wisconsin has affirmed the same doctrine in Osborne v. McQueen, 67 Wis. 392, 29 N. W. 636, and in Park v. Richardson & Boynton Co., 81 Wis. 399, 51 N. W. 572.

I have examined all the cases cited by the defendants in opposition to this construction of the warranty, and have not found one that may be properly said to take the other view and support the defendants' contention. In most of them there is a plain obligation upon the purchaser to return, either expressed or necessarily implied.

One case which is relied upon by the defendants is Himes v. Kiehl, 154 Pa. 190, 25 Atl. 632. In that case the warranty related to the sale of an engine, and the point made by the defendants in an action upon the warranty was based upon the proposition that the guaranty in suit was "that the engine would give sufficient power to run the separator, or that they would take it back," and that the plaintiffs, without complaint or offer to return the engine, continued to use it, and afterwards sold it, without an offer to return. The court held the contention good, and that it should have been affirmed. In that case it was clearly a condition of the guaranty that the engine should be taken back if it did not give sufficient power to run the separator. That was all the guaranty there was.

In another case much relied upon on the hearing (Hills v. Bannister, 8 Cow. [N. Y.] 32), there was a sale of a church bell, and the vendor had guarantied that it should not crack for one year, and to recast it if it did crack. It was properly held that an action was not maintainable without first giving the sellers an opportunity to recast the bell. That was the substance of their guaranty,—that they would recast the bell in case it cracked within the year,—and the law would not hold them to any other or different measure of relief.

In the proper construction of the warranty in the case at bar, there are one or two other considerations which I think should have some weight. The warranty is in print, being part and parcel of a printed blank for the sale of horses by the defendants, furnished and in common use by them. The guaranty is absolute and complete in itself, closing with a full stop. The provision for a return of the horse, which is superadded, does not in terms make it obligatory upon the purchasers to return him. It only says that upon his delivery to the sellers without cost, if as sound and in as good condition as when purchased, the sellers will replace him with another horse. It is only by construction that any obligation can be put upon the purchasers to return the horse. It would have been very easy by the change of a few words, to have placed the obligation upon the purchasers, in express terms, that is now sought to be put upon them by construction. Under these circumstances, it would seem proper to apply the rule that is sometimes applied, that, when there is doubt about the proper construction, to construe the contract most strongly against the person furnishing the printed blank containing the provision in question.

It is evident that, if the construction contended for by the defendants be the true one, the remedy under the warranty, in the circumstances of this case, might amount to but very little. Under the provision that the horse must be as sound and in as good condition when returned as at the time of the sale, it is evident that the purchasers could refuse to receive him back if he lacked in any degree of being in as good condition as when sold. The sale was in March. The foal-getting qualities of the horse could not be tested until late in the season of that year. If in the meantime a ringbone or spavin or other defect should come upon the horse, or he should have any distemper or sickness common to horses, without any fault on the plaintiffs' part, and perhaps from causes existing before the sale, the vendors might refuse to receive the horse back, though the defect may have had no relation to or effect upon his value for the purposes for which he was sold, in which case the purchasers would have no benefit from the warranty.

There is a provision in writing filled into the blank which shows quite clearly that the vendors intended to have it in their power to take advantage of any slight defect or ailment whatsoever in the horse arising after the sale, though it should have no relation to his qualities as a foal getter. That provision is this, that: "In case this horse is returned on account of not being a reasonable foal getter, a lump on inside right fore leg, and below the knee, shall not be considered a blemish and reason for not taking him back, as a small injury appears there now."

If he did not prove to be a good foal getter, which could not be tested until one season had elapsed, and could not be returned on account of some small blemish not affecting materially his value, which rendered him in not so good a condition as at the time of the sale, the warranty would be of no appreciable value, if there were no remedy for a breach except to return the horse. Such a result, considering the language used. could hardly have been in the contemplation of the parties.

The motion for a new trial is denied.[8]

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[8] Compare Wasatch Orchard Co. v. Morgan Canning Co., 32 Utah, 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540 (1907), and Nutting v. Watson, Woods Bros. & Kelly Co., 84 Neb. 464, 121 N. W. 582, 25 L. R. A. (N. S.) 823 (1909).

# CHAPTER VIII

# STATUTE OF FRAUDS

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## 29 Car. II, c. 3, § 17.

"And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [A. D. 1677] no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

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## SECTION 1.—"CONTRACT FOR THE SALE OF GOODS"

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### COOKE et al. v. MILLARD et al.

(Commission of Appeals of New York, 1875. 65 N. Y. 352, 22 Am. Rep. 619.)

Dwight, C.[1] * * * The question is thus reduced to the following proposition: Is a contract which is, in form, one of sale of lumber then in existence for a fixed price, where the seller agrees to put it into a state of fitness to fill the order of the purchaser, his work being included in the price, in fact a contract for work and labor and not one of sale, and accordingly not within the statute of frauds?

The New York statute is made applicable to the "sale of any goods, chattels or things in action," for the price of $50 or more. The words "goods and chattels" are, literally taken, probably more comprehensive than the expressions in the English statute, "goods, wares and merchandise." It will be assumed however in this discussion, that they are equivalent.

There are at least three distinct views as to the meaning of the words in the statute. These may be called, for the sake of convenience, the English, the Massachusetts and the New York rules, as representing the decisions in the respective courts.

The English rule lays especial stress upon the point, whether the articles bargained for can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which at the time of the delivery could be the subject of sale by him, the case is within the statute of frauds. The rule excludes all cases where work is done upon the goods of another, or even materials supplied or added to the goods of another. Thus if a carriage-maker should repair my carriage, both furnishing labor and supplying materials, it would be a contract for work and labor, as the whole result of his efforts would not produce a chattel which could be the subject of sale by him. If on the other hand, by the contract he lays out work or materials, or both, so as to produce a chattel which he could sell to me, the contract is within the statute.

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[1] The statement of facts and part of the opinion are omitted.

This conclusion has been reached only after great discussion and much fluctuation of opinion, but must now be regarded as settled. The leading case upon this point is Lee v. Griffin, 1 Best & Smith, 272, Benj. Sales, 77. The action was there brought by a dentist to recover £21 sterling for two sets of artificial teeth, made for a deceased lady of whose estate the defendant was executor. The court held this to be the sale of a chattel within the statute of frauds. Blackburn, J., stated the principle of the decision in a clear manner: "If the contract be such that it will result in the sale of a chattel, then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be any thing which could properly be said to be the subject of sale, the action is for work and labor."

The Massachusetts rule, as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can, at the time stipulated for delivery, be regarded as "goods, wares and merchandise," in the sense of being generally marketable commodities made by the manufacturer. In that respect it agrees with the English rule. The test is not the non-existence of the commodity at the time of the bargain. It is rather whether the manufacturer produces the article in the general course of his business or as the result of a special order. Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112. In this very recent case, the result of their decisions is stated in the following terms: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute."

Under this rule it was held in Gardner v. Joy, 9 Metc. 177, that a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale. On the other hand in Goddard v. Binney, supra, the contract with a carriage manufacturer was that he should make a buggy for the person ordering it, that the color of the lining should be drab and the outside seat of cane, and have on it the monogram and initials of the party for whom it was made. This was held not to be a contract of sale within the statute. See, also, Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256; Lamb v. Crafts, 12 Metc. 353; Spencer v. Cone, 1 Metc. 283.

The New York rule is still different. It is held here by a long course of decisions that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word "sale." There must be a sale at the time the contract is made. The latest and most authorative expression of the rule is found in a recent case in this court. Parsons v. Loucks, 48 N. Y. 17, 19, 8 Am. Rep. 517.

The contrast between Parsons v. Loucks, in this state, on the one hand, and Lee v. Griffin, supra, in England, on the other, is, that in the former case the word "sale" refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this state agreeing with Parsons v. Loucks are Crookshank v. Burrel, 18 Johns. 58, 9 Am. Dec. 187; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Parker v. Schenck, 28 Barb. 38. These cases are based on certain old decisions in England, such as Towers v. Osborne, 1 Strange, 506, and Clayton v. Andrews, 4 Burr. 2101, which have been wholly discarded in that country.

The case at bar does not fall within the rule in Parsons v. Loucks. The facts of that case were that a manufacturer agreed to make for the other party to the contract, two tons of book paper. The paper was not in existence, and so far as appears, not even the rags, "except so far as such existence may be argued from the fact that matter is indestructible." So in Sewall v. Fitch, supra, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser—dressed and put in a condition to fill his order. The court accordingly is not hampered in the disposition of this cause by authority, but may proceed upon principle.

Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in Lee v. Griffin. It is at once so philosophical and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this State. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principle. The court however in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this State, is that when the chattel is in existence, so as not to be governed by Parsons v. Loucks, supra, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will however readily be classified. If, on further discussion, the rule in Lee v. Griffin should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the Legislature. * * *

## EVANS v. ROBERTS.

(Court of King's Bench, 1826. 5 Barn. & C. 829.)

Indebitatus assumpsit, for crops of potatoes bargained and sold. Plea, the general issue. At the trial before Garrow, B., at the Spring assizes for the county of Monmouth, 1826, it appeared, that on the 25th of September, a verbal agreement was made between the plaintiff and defendant, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of £5., and the defendant paid 1s. earnest. It was objected, that this was a contract or sale of an interest in or concerning land, within the meaning of the fourth section of the statute of frauds. The learned Judge was of opinion, that as the seller was to turn up the potatoes, the contract did not give the buyer any interest in the land; and he directed a verdict to be found for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Bayley, J. I am of opinion, that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale and delivery of things which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; the vendor was to raise the potatoes from the ground at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument, to show that this contract gave the vendee an interest in the land within the meaning of the fourth section of the statute of frauds, are distinguishable from the present case.

In Crosby v. Wadsworth, 6 East, 602, the buyer did acquire an interest in the land; for, by the terms of the contract, he was to mow the grass, and must, therefore, have had the possession of the land for that purpose. Besides, in that case, the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a fi. fa.; it goes to the heir and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels, by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold [see Com. Dig. tit. Biens (G,) and Gilbert's Law of Evidence, 214,] and may be taken in execution under a fi. fa., by which the sheriff is commanded to levy the debt of the goods and chattels of the defendant; and if a growing crop of potatoes be chattels, then they are not within the provisions of the fourth section of the statute of frauds, which relates to lands, tenements, or hereditaments, or any interest in or concerning them.

In Parker v. Staniland, 11 East, 362, the owner of a close cropped with potatoes, made a contract on the 21st of November, to sell them at so much per sack, and the purchaser was to raise them from the ground immediately; and that was held not to be a contract for any interest in or concerning land. In that case, as well as in Warwick v. Bruce, 2 M. & S. 205, the potatoes had ceased to grow; and, therefore, they are distinguishable from the present; but the reasoning of Lord Ellenborough in the latter case may assist us in coming to a right conclusion in the present; he there says: "If this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of Crosby v. Wadsworth, 6 East, 602. But here is a contract for the sale of potatoes at so much per acre: the potatoes are the subject matter of sale; and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel." It does not appear that the other Judges gave any opinion upon that point; but it is clear that Lord Ellenborough's judgment proceeded upon the ground that if the contract gave to the vendee no right to the land so as to enable him to make a profit of the growing surface, then it was not to be considered as giving him an interest in the land, but merely in a chattel.

The opinion delivered by Mansfield, C. J., in Emmerson v. Heelis, 2 Taunt. 38, is certainly at variance with our judgment in the present case. But it is first to be observed, that it was not necessary in that case for the Court to decide the question upon the fourth section of the statute of frauds, for the contract was signed by the auctioneer as the agent of the buyer, and was equally binding whether it was for a sale of goods and chattels or of an interest in land. The plaintiff there put up to sale on the 25th of September, by public auction, a crop of turnips then growing on his land, in separate lots, and under certain conditions of sale. The defendant, by his agent, attended at the sale, and being the highest bidder for twenty-seven different lots, was declared to be the purchaser; and the name of the defendant was written in the sale bill opposite to each particular lot for which he had been declared the highest bidder. Mansfield, C. J., there says, "As to this being an interest in land, we do not see how it can be distinguished from the case of hops decided in this court; and if the auctioneer is an agent for the purchaser, then the statute of frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged therewith."

The ground of the Lord Chief Justice's opinion, as to the contract giving the purchaser an interest in the land, was that the case could not be distinguished from that of Waddington v. Bristow, 2 Bos. & Pul. 452. It becomes necessary, therefore, to consider whether the two cases be similar. In the latter case the contract was made in November for all the hops which should be grown in the ensuing year upon a given number of acres of land. At that time the hops which were the subject of the contract were not in existence; there was nothing but the root of the plant, and the purchaser was not to have that. The question in that case was, not whether the agreement, which was in writing, was for an interest in the land, but whether it ought to have been stamped. It was contended that it was within the exception in the stamp act, an agreement made for and relating to the sale of goods, wares, and merchandise. All the Judges concurred in the judgment that the contract in that case was not an agreement for the sale of goods, wares, and merchandise; but their opinions were founded upon different reasons. Lord Alvanley thought that it was an agreement for the sale of goods, wares, and merchandise, and something more, viz. for the produce of the land in a certain state at the time of delivery. The opinions of Heath and Rooke, Js., proceeded on the ground that the hops at the time of the contract did not exist as goods, wares, and merchandise. Chambre, J., was the only Judge who intimated an opinion that the contract gave the vendee an interest in the land. He certainly stated that the contract gave the vendee an interest in the produce of the whole of that part of the vendor's farm which consisted of hop grounds.

I concur in opinion with the three learned Judges, who thought in that case that the hops were not goods, wares, and merchandise at the time of the contract; but I do not agree with Lord Chief Justice Mansfield that there was no distinction between the hops in that case and the growing turnips in the case of Emmerson v. Heelis, because I think that in the latter case the growing turnips at the time of the contract were chattels. It has been insisted, that the right to have the potatoes remain in the ground is an interest in the land: but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor.

In Tidd's Practice, 1039, it is laid down that under a fieri facias the sheriff may sell fructus industrialis, as corn growing, which goes to the executor, or fixtures which may be removed by the tenant; but not furnaces or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor and those which go to the heir. The former may be seized and sold under the fi. fa., the latter cannot. The former must, therefore, in contemplation of law, be considered chattels. It appears, therefore, that when it was necessary at common law to distinguish between what was land and what was not, a growing crop produced by the labor and expense of the occupier of lands was, as the representative of that labor and expense, considered an independent chattel, not going as the land does, but in a different direction. Upon the same principle the purchaser of a growing crop, who by his contract acquires a right to have the crop continue in the land of the seller until it arrived at maturity, must, before the passing of the statute of frauds, have been considered to have had an interest not in the land, but in a chattel independent of the land; and that being so, I cannot suppose that by the fourth section of that statute, which enacts, that unless certain provisions be complied with, no action shall be brought upon any contract or sale of any interest in or concerning lands, tenements, or hereditaments, the legislature contemplated, as the subject matter of such contract or sale, that interest which passes from a vendor to a vendee by a sale of a growing crop of potatoes.

The statute 56 G. 3, c. 50, indeed, is a legislative declaration that growing crops may be seized and taken in execution under a fi. fa. It prevents their being so seized in cases where the tenant is restrained by covenant in his lease from removing them off the premises. The case of Mayfield v. Wadsley, 3 B. & C. 357, also shows, that where there is a sale of growing crops, distinct from any assignment or letting of the land, the crops do not constitute part of the inheritance, or any interest in land, but are mere chattels, and may be recovered under a count for goods bargained and sold. Upon these grounds, I am of opinion that there was not in this case any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them within the fourth section of the statute of frauds; but that there was a contract for the sale of goods, wares, and merchandise within the meaning of the seventeenth section, though not to the amount which makes a written note or memorandum of the bargain necessary.

The rule for entering a nonsuit must therefore be discharged. Rule discharged.[2]

## MARSHALL v. GREEN.

(Court of Common Pleas, 1875. L. R. 1 C. P. Div. 35.)

Lord Coleridge, C. J.[3] This is an action in respect of the entry by the defendant upon certain land in the occupation of the plaintiff's tenant, and the cutting down of certain trees. The facts were these. The plaintiff was the owner in fee of a copyhold tenement on which certain timber trees were growing. The tenement was under lease, but the custom of the manor reserved the trees upon the tenement leased to the owner in fee of the copyhold tenement. The plaintiff had communicated with the defendant, a timber merchant, on the subject of his wish to sell the trees; but some question had arisen as to the number of the trees, and it was agreed that the plaintiff and defendant should go over the land together to inspect the trees. On the 27th of February they went over the land for that purpose, and there was then a parol sale of twenty-two trees at the price of £26., and it was arranged that the trees should be "got away as soon as possible." The defendant's servants entered, and on the 2d, 3d, and 4th, of March, they cut down the trees. On the 2d of March, after six trees had been cut down, the plaintiff wrote countermanding the sale. The defendant had sold the tops and stumps before receipt of the letter of countermand; but, though sold before, they were not taken away until after such letter was received. If there was a valid contract for the sale of the trees, the plaintiff must fail; the trees had been sold, and the property had passed; the land was not in the plaintiff's possession, but his tenant's, and the defendant had a perfect right to do what he did.

It is not denied that there was a verbal contract, and the question therefore is whether this was a contract which required to be in writing under the Statute of Frauds. If so, the defendant was in the wrong, because there was no such contract. The first question is whether this was a contract within the 4th section, as being a "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." These words have given rise to a great deal of discussion, and very high authorities have said that it is impossible to reconcile all the decisions on the subject. If the matter were res integra, I should be inclined to think that there was much to be said for Littledale, J.'s view, that the words of the statute were never meant to apply to such a matter as this at all, but only referred to such interests as are known to conveyancers. It is, however, too late now to maintain this view, inasmuch as there are a great number of decisions which proceed on the opposite view. It is clear on the decisions that there are certain natural growths which, under certain circumstances, have been held to be within the words of the section, and a contract with respect to which must, therefore, be in writing.

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[2] Concurring opinions were delivered by Holroyd and Littledale, JJ.

[3] The statement of facts is omitted.

The question then is what the rule is to be. The matter has been much discussed, and for my part I despair of laying down any rule which can stand the test of every conceivable case. If it is said that there is an interest in land within the section when the sale is of something which, before it is taken away, is to derive benefit from the land, and to become altered by virtue of what it draws from the soil, the rule is an intelligible one, but one which it is almost impossible to apply with absolute strictness. The effect of such a rule, if strictly applied, would vary at different times of the year. If the sale were in the spring, and the removal of the thing sold were to be postponed but for two or three days, it would not, at its severance, in strictness, be in the same state as it was at the time of the sale. On the other hand, in winter, when the sap is out of the tree, and it is standing, as it were, dead for the time being, there would be no appreciable change. It is almost impossible to say that the rule can be that, wherever anything, however small, is to pass into that which grows on the land, out of the land, between the sale and the reduction into possession, the contract is within the section.

I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams' Saunders upon the case of Duppa v. Mayo, p. 395: "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or fructus industriales, &c., the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods."

The propositions so laid down, as applied to the present case, seem to afford a very clear and intelligible rule. Planted trees cannot in strictness be said to be produced spontaneously, yet the labour employed in their planting bears so small a proportion to their natural growth, that they cannot be considered as fructus industriales, but treating them as not being fructus industriales, the proposition is that where the thing sold is to derive no benefit from the land, and is to be taken away immediately, the contract is not for an interest in land. Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber.

There do not seem to be any decisions which prevent our deciding in conformity with the common sense of the matter. On the contrary, there is a case of Smith v. Surman, 9 B. & C. 561, in which the Court of Queen's Bench held, under circumstances very like those of the present case, that there was no contract for an interest in land. The only distinction that I can see between that and the present case, is that there the trees were to be cut by the vendor; but Littledale, J., held that, "if in that case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in land within the meaning of the statute." This decision has never been questioned, and has been adopted in subsequent decisions. It seems to me, therefore, that both common sense and authority combine to shew that this was not a contract for an interest in land within the section.

The remaining question is whether this contract was within the 17th section. This depends on whether there was here an acceptance and actual receipt of part of the goods. There have been many decisions on the question, what amounts to such an acceptance and receipt; it was very early determined that an actual manual receipt of the article sold was not necessary, but that a constructive receipt would do. Here six of the trees were cut down before the sale was countermanded, and at a time when it must be taken that that was done with the assent of the seller, and portions were sold. What more could have been done short of actually removing the trees? These were bulky trees, that a man could not carry away like a small article. If anything short of actual manual possession could be sufficient, all was done that could be done. The defendant immediately cuts down the trees and converts them into chattels, and deals with them as owner by selling the tops and stumps. In the absence of any decision on the subject, I should have said that, if it be once admitted that anything short of actual manual possession could be a sufficient acceptance and receipt, there was amply sufficient to shew such an acceptance and receipt here.

But we are not without authority on the subject. There have been repeated decisions that, where anything has been done on the part of the vendee under such a contract as this to the whole or part of the goods indicating an intention to deal with the subject-matter as owner in possession, and he is allowed by the vendor so to deal with it, that amounts to an acceptance and receipt within the statute. It has been held with regard to bulky things, that the delivery of the indicia of title was sufficient. When the purchaser had marked the goods, and left them so marked on the vendor's premises, it was held that there was a sufficient acceptance and receipt. The case of Chaplin v. Rogers, 1 East, 192, seems to me to be a distinct authority for the view that there was an acceptance and receipt here, the words of the section having received all the fulfilment the subject-matter was capable of. I do not rely on the circumstance that the land was in the possession of the plaintiff's tenant. It seems to me that, apart from that circumstance, and treating the land as being the vendor's the case is clear.

The result is that the plaintiff fails on both points, and the rule must be absolute.

Rule discharged.[4]

## GREEN v. ARMSTRONG.

(Supreme Court of New York, 1845. 1 Denio, 550.)

BEARDSLEY, J.[5] A verbal contract was made between these parties, by which the defendant agreed to sell certain trees then standing and growing on his land, to the plaintiff, with liberty to cut and remove the same at any time within twenty years from the making of the contract. A part of the trees were cut and removed under this agreement, but the defendant then refused to permit any more to be taken, and for this the plaintiff brought his action in the justice's court, where a judgment was rendered in his favor. On the trial of the cause the defendant objected to proof of such parol contract, but the objection was overruled. The judgment was removed by certiorari to the court of common pleas of Oneida county, and was reversed by that court, on the ground, as the record states, that the contract, not being in writing, was void by the statute of frauds.

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[4] Concurring opinions were delivered by Brett and Grove, JJ.

[5] The statement of facts is omitted.

As the declaration stated that the contract was by parol and not in writing, and the defendant pleaded instead of demurring, it is now urged on behalf of the plaintiff in error, that the defendant was precluded from objecting, on the trial of the cause before the justice, or in the court of common pleas, to proof of a parol contract, or that such contract was void. It is insisted the defendant should have demurred, if a verbal contract like this was invalid, and that by pleading to the declaration, its sufficiency, and consequently the validity of the contract as stated, were admitted; and if, in truth, the contract was for this reason void, the defendant, having failed to make the objection at the proper time and in an appropriate manner, is now remediless.

If the action had been pending in this court, or in a court of common pleas, the principles stated would, to a certain extent, have been applicable; for the objection that the contract was by parol and not in writing, could not have been made on the trial of the issue joined. But a verdict on the issue would not have concluded the defendant, for he might still move in arrest of judgment, and thus raise the question as to the validity of the contract declared on. A motion in arrest, however, cannot be made in the justice's court, and where issue has been joined, as in this case, if the defendant cannot, on the trial or on certiorari, object that the contract is void, he is without any redress whatever. But pleading to a declaration, when the party might have demurred, cannot be allowed to have any such conclusive effect upon the rights of the party: it cannot make a void contract valid, or at all change the real rights of the litigant parties. The orderly and formal mode of making the objection would be by demurrer or motion in arrest; but this is only a matter of form. And as it was too late to demur, and a motion in arrest could not be made, I have no difficulty in saying the objection was properly made on the trial, and in the common pleas, and it must now be determined by this court.

The Revised Statutes declare that no "interest in lands" shall be created, unless by deed or conveyance in writing; and that every contract for the sale of "any interest in lands" shall be void unless in writing. 2 R. S. 134, §§ 6, 8. Certain exceptions and qualifications to these enactments are contained in the sections referred to, but none which touch the question now before the court: and so far as respects this question the former statute of New-York, and the English statute of 29 Charles 2, ch. 3, contain similar provisions. 1 R. L. of 1813, p. 78; Chit. on Cont. 299.

The precise question in this case is, whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land. If it is, it must follow that the one declared on in this case, not being in writing, was invalid, and the judgment of the common pleas, reversing that of the justice, was correct and must be affirmed.

And in the outset I must observe, that this question has not, to my knowledge, been decided in this state. It has, however, arisen in the English courts, and in some of those of our sister states; but their decisions are contradictory, and the views of individual judges wholly irreconcilable with each other. Greenl. Ev. (2d Ed.) § 271, and notes; Chit. on Cont. 299 to 302; 4 Kent's Com. (5th Ed.) 450, 1. We are, therefore, as it seems to me, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve, and especially if it be equally applicable to other and analogous cases.

By the statute, a contract for the sale of "Any interest in lands" is void unless in writing. The word "land" is comprehensive in its import, and includes many things besides the earth we tread on, as waters, grass, stones, buildings, fences, trees and the like; for all these may be conveyed by the general designation of land. 1 Shep. Touch. by Preston, 91; 1 Inst. 4; 1 Preston on Estates, 8; 2 Black. Com. 17, 18; 1 R. S. 387, § 2; 2 R. S. 137, § 6. Standing trees are therefore part and parcel of the land in which they are rooted, and as such are real property. They pass to the heir by descent as part of the inheritance, and not, as personal chattels do, to the executor or administrator. Toller's Law of Executors, 193, 4, 5; 2 Black. Com. by Chitty, 122, note; Rob. on Frauds, 365, 6; Richard Liford's Case, 11 Rep. 46; Com. Dig. Biens, (H). And being strictly real property, they cannot be sold on an execution against chattels only. Scorell v. Boxall, 1 Younge & Jer. 396; Evans v. Roberts, 5 Barn. & Cress. 829.

It is otherwise with growing crops, as wheat and corn, the annual produce of labor and cultivation of the earth; for these are personal chattels, and pass to those entitled to the personal estate, and not to the heir. Toller, 150, 194; 2 Black. Com. 404. They may also be sold on execution like other personal chattels. Whipple v. Foot, 2 Johns. 418, 3 Am. Dec. 442; Jones v. Flint, 10 Adol. & Ellis, 753; Peacock v. Purvis, 2 Brod. & Bing. 362; Hartwell v. Bissell, 17 Johns. 128.

These principles suggest the proper distinction. An interest in personal chattels may be created without a deed or conveyance in writing, and a contract for their sale may be valid although by parol. But an interest in that which is land, can only be created by deed or written conveyance: and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be personal property when transferred to the purchaser. If, when sold, it is, in the hands of the seller, a part of the land itself, the contract is within the statute. These trees were part of the defendant's land and not his personal chattels. The contract for their sale and transfer, being by parol, was therefore void.

The opinion of the court in the case of Dunne v. Ferguson, 1 Hayes (Irish) R. 542, contains one of the best illustrations of this question. That case is thus stated in Stephens' N. P. 1971:

"The facts of the case were, that in October, 1830, the defendant sold to the plaintiff a crop of turnips, which he had sown a short time previously, for a sum less than ten pounds. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use. No note in writing was made of the bargain. It was contended for the defendant, that the action of trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing pursuant to the statute of frauds. Upon the foregoing facts Chief Baron Joy observed (Barons Smith, Pennefeather and Foster, concurring):

"The general question for our decision is, whether there has been a contract for an interest concerning lands, within the second section of the statute of frauds? or whether it merely concerned goods and chattels? And that question resolves itself into another, whether or not a growing crop is goods and chattels? In one case it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe: and in another case, the distinction turned upon the hand that was to dig them, so that if dug by A. B. they were potatoes, and if by C. D. they were an interest in lands. Such a course always involves the judge in perplexity, and the case in obscurity. Another criterion must, therefore, be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be goods; and they were subject to all the leading consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them, and provides for lands and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the cases of Evans v. Roberts, 5 Barn. & Cress. 829, Smith v. Surman, 9 Barn. & Cress. 561, and Scorell v. Boxall, 1 Younge & Jer. 396, have been decided. And as we think that growing crops have all the consequences of chattels, and are like them, liable to be taken in execution, we must rule the points saved for the plaintiff."

Various other decisions have proceeded on the same principle, although it has nowhere been stated and illustrated with the same clearness and force as in the opinion of Chief Baron Joy.

The following cases may be cited to show that growing crops of grain and vegetables, fructus industriales, being goods and chattels, and not real estate, may be conveyed by a verbal contract, as they may also be sold on execution as personal chattels. Carrington v. Roots, 2 Mees. & Wels. 248; Sainsbury v. Matthews, 4 Mees. & Wels. 343; Randall v. Ramer, 2 Johns. 421, note; Mumford v. Whitney, 15 Wend. 387, 30 Am. Dec. 60; Austin v. Sawyer, 9 Cow. 39; Jones v. Flint, 10 Adol. & Ellis, 753; Warwick v. Bruce, 2 Maule & Selw. 205; Graves v. Weld, 5 Barn. & Adol. 105.

But where the subject matter of a contract of sale, is growing trees, fruit or grass, the natural produce of the earth, and not annual productions raised by manurance and the industry of man, as they are parcel of the land itself, and not chattels, the contract, in order to be valid, must be in writing. Teal v. Auty, 2 Brod. & Bing. 99; Putney v. Day, 6 N. Hamp. R. 430; Olmstead v. Niles, 7 id. 522; Crosby v. Wadsworth, 6 East, 602; Rodwell v. Phillips, 9 Mees. & Wels. 501; Jones v. Flint, 10 Adol. & Ellis, 753.

The contract in this case was within the statute, and being by parol was void. The judgment of the common pleas must be affirmed.

Judgment affirmed.[6]

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## LAVERY v. PURSELL.

(Chancery Division, 1888. 39 Ch. Div. 508.)

Action for the specific performance of a contract; or, alternatively, for damages. On November 11, 1886, at an auction sale, the plaintiff bought from the defendant "the valuable building materials of the spacious premises in Milk Street, Cheapside," formerly the City of London School, and afterwards the Constitutional Club, "comprising the sound brick and stone work, stout timber, joists, partitions and rafters; flooring and joinery; baths and lavatory fittings, cupboards, lifts, ranges, stoves, gas and water piping; stone staircase, York paving and real paving tiles, roofing slates and many tons of lead." By the conditions of sale possession of the premises was to be given to the purchaser "for the purpose only of taking down and removing materials" and the materials were "to be taken down and cleared off the ground" on or before the 11th of January next. The plaintiff paid part of the purchase price and was given possession under the contract. There was a memorandum of the sale, but it was insufficient because of the absence of a description of the vendor.[7]

CHITTY, J. * * * I now come to the serious question of law, whether this contract falls within section 4 of the Statute of

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[6] As to trees in a nursery, see Miller v. Baker, 1 Metc. (Mass.) 27 (1840); Whitmarsh v. Walker, 1 Metc. (Mass.) 313 (1840). As to fruit on the tree see Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591 (1874).

[7] The statement of the case is abridged and part of the opinion is omitted.

Frauds, as the Defendants contend, or within section 17, as the Plaintiff contends. Now, unquestionably section 4 of the Statute of Frauds has been often considered by the Courts, and I do not think I am wrong in saying that, in part, the section itself has been embedded in the decisions. But it is useful from time to time to refer back to the statute; and the words of section 4, so far as is material, are, "any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them." Now the Legislature evidently thought in framing that 4th section that there were some contracts of so important a nature that it was not right to leave them to depend on the slippery testimony of men's memories, and therefore that there should be some note or writing which should be preserved to authenticate the contract; and contracts of this class, that is, of the class as to which I read the words, are within those which in the view of the Legislature required either a contract in writing signed by the parties to it, or some note or memorandum.

What is this contract? On the one side it is said to be a contract merely for the sale of bricks and mortar and stone and building materials; on the other side that it is the sale of a standing house, but a standing house which is not to be retained as a standing house by the purchaser, but one which, standing at the time, is to be pulled down. Quite apart from authority, it would strike any lawyer, first of all, that the house, which is standing on the land, is a tenement or hereditament. I see no escape from it. This house happens to be a very large and important house, and it does seem strange at first sight that the Legislature should protect me if I sell my house as a thing standing and not to be taken away, and should require that there should be a note or memorandum of that contract; but that if I sell my house which is now standing, and which is to be pulled down over my head by somebody else, that that should be considered a less important contract, and that no writing should be required.

The thing sold, as it stands at the moment, is a hereditament. It is said that there is no interest in a hereditament, but then that is answered, if I am right, in saying that the standing house is a hereditament. Then it is said that there is no interest in the soil. That is true in this sense, and in this sense only, that there is no permanent interest. But in this contract, and in fact in every contract of this kind, there must be, and is here, a right to go in and hold for the purpose of pulling down; and that again seems to be an interest in the hereditament or tenement. I am now speaking quite apart from decision. How can this question be answered, taking the language of the 4th section except that this is a contract concerning a hereditament?

Then it is said that there is a distinction, and that the intention of the parties was to treat the house as a chattel and so bring it within the 17th section. I can understand that, without any difficulty, where the owner of the house is to pull his own house down; but I have the greatest difficulty in following the argument where the purchaser is to pull the house down. Indeed there is, as it appears to me, under this contract, first, a contract concerning a hereditament, and, from the very nature of the thing and the time which must be occupied in pulling down these materials (from the 11th of November to the 11th of January upon the contract, and which upon the evidence is about a reasonable time for so doing), accompanied, as it seems to me, with an interest in the way of license or possession, which again brings it within the scope of the words of the 4th section. The contract itself speaks, as I have already said, in the second clause, of possession; and that is the language the parties have used. Of course on reading the whole contract, I might see that it is not possession simply in point of law, but something less; but on reading this contract I think possession expresses what the parties meant—namely, it is to be possession, although it is for a limited purpose: it is possession for the purpose of taking down and removing the materials.

The vendor seems to consider himself, according to these terms, to be out of possession, because by the 12th condition he reserved a right of access. It is not necessary to go very minutely into this point, but I think that the contract does purport to confer on the purchaser the right to be there for the purpose of taking down and removing the materials, and does give him either a complete or a qualified possession; but still a possession of the soil itself—of the land, tenements and hereditaments; certainly of the whole of the house. That being so, if the question was free from authority, I should have thought that this case fell within the statute. Of course I am not forgetting the mode in which the property is sold. It is sold as building materials, and if the intention of the parties prevailed it might mean that it is sold as a chattel, but the point still is that it is not a chattel at the time of the sale; and the Statute of Frauds, so far as I can see, does not enable parties to say, "We will agree to treat this thing as a chattel," when in point of law it is a hereditament.

Now the authority upon which the Plaintiff relied is Marshall v. Green, 1 C. P. D. 35. In that case the subject-matter of the contract was standing trees, fit to be cut as timber. The intention of the parties unquestionably was to sell and buy as timber. There was no stipulation there in regard to possession, but it was a part of the terms of the contract that the purchaser should cut, and of course part of the terms of the contract that he should enter for that purpose. On the facts it appeared that six trees had been cut down by the defendant, who was sued for the wrongful acts of cutting down the trees. The substantial question was whether the defendant was a trespasser and wrongdoer in cutting the trees, and that depended upon whether he had an enforceable contract to cut the trees. He had cut six trees, and then a notice was given to him by the owner of the trees to cut no more. After that he entered and still cut, and the question was as to his liability in respect of those trees. Sir Arthur Watson in arguing this case spoke of a revocable license, but the Common Pleas Division appeared to consider that this was not a revocable license, because they held that he was justified in cutting the trees notwithstanding the notice. Then the trees being standing trees to be cut by the purchaser, the Court held that it was not within the 4th section. Of course I am bound by the decision itself, and I am bound by any principle of law that is necessary to the decision, but I am not bound by the decision beyond that.

Now the Court appears to have considered that there was no interest in the land. I agree that it was a point, if I may say so with great respect, that required a good deal of attention, whether a standing tree is a chattel or can be made by any acts of the parties a chattel. It is a hereditament at the time when the contract is made. It is just as much a hereditament in point of law as a house which is standing on the land and just as much so as the mines which are underneath. I only speak now as a real property lawyer. I am bound of course by the English law to say that a tree is not a chattel. Indeed if a man were indicted for larceny of a tree the indictment would be quashed. I feel a little difficulty in following that reasoning, which, for the purposes of section 4, through the intention of the parties, changes the nature of the property from realty to personalty, but I make these observations merely for the purpose of endeavouring to get at the principle on which the decision turns and not for the purpose of making any unnecessary comments on what was said.

The Lord Chief Justice says, and I thoroughly agree with him, that it is difficult, if not impossible, to reconcile all the authorities in these matters. He mentions the cases which referred to the fructus naturales and the fructus industriales, which have no doubt given rise to a considerable difference of opinion, and he quotes the well-known passage in Williams' Saunders, vol. 1, p. 395 (Duppa v. Mayo), where it was said that where the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, the contract is for goods. I pause for one moment to say that I am always myself afraid in dealing with propositions of law to use metaphors. They are very often very convenient, but if pressed too far they often lead to erroneous conclusions. Taking this statement, could the land in the case before me be considered as the warehouse for the building? Why certainly not. Such a contention as that, on the mere statement of it, would be one which could not be permitted in a Court of Justice. I say that merely to follow the reasoning, but when the case is examined as a whole it will be seen that the judgment turned upon this that they considered that as the trees were to be cut down as soon as possible, and were almost immediately cut down, the thing sold was a chattel.

A point was taken with reference to the statement by Lord Justice Brett, 1 C. P. D. 42: "With respect to the first point, when the subject-matter of the contract is something affixed to land, the question is whether the contract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixed." I think upon that, that the Lord Justice did not intend to draw any such distinction as to the word commented on—that the tree was affixed or was a fixture. I can see nothing in the argument founded on that proposition. The true basis of his judgment is, I think, to be found in the same page, where he says: "The contract is not for an interest in the land, but relates solely to the thing sold itself."

Though that case may be open hereafter to further consideration, of course I cannot reconsider it, nor can I differ from it. It is evident that if that view is right, which I will assume it to be, a line must be drawn somewhere, because, if this principle were carried to the full extent, there being no distinction between the timber on the land in point of law and the mines, then it would have to be said, following out what the Plaintiff says was the principle of this decision, that a contract for all the coal or minerals under a man's land, with a license to enter and get it, is not within section 4. Some explanation why that should be was attempted to be given by Plaintiff's counsel, but without success. The answer perhaps is, that Courts of Justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, "This is a horse's tail," at some time. What I say is that I must draw the line at this case, because on the facts it is quite different, or materially different, from Marshall v. Green, 1 C. P. D. 35, and I leave that case as it stands on its own footing and must hold that this case comes within the 4th section. * * *[8]

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[8] Compare Long v. White, 42 Ohio St. 59 (1884), in which an oral contract to sell a dwelling house then standing upon the premises of the vendor, and which the vendor agreed to deliver "standing upon blocks in his yard," on or before a certain day, was held to be a contract for the sale of personalty. Said the court: "In applying the statute of frauds, buildings are not classed with forest trees, but with growing crops, nursery trees, and fixtures attached to realty. And buildings are realty or personalty, according to the intention of the parties. And when the parties in interest agree that they may be severed and moved from the realty, buildings are held and treated as personalty."

As to fixtures, see Lee v. Gaskell, 1 Q. B. D. 700 (1876); South Baltimore Co. v. Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507 (1888); Moody v. Aiken, 50 Tex. 65 (1878); Williston, Sales, § 65.

## HIGGINS v. KUSTERER.

(Supreme Court of Michigan, 1879. 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160.)

CAMPBELL, C. J. Higgins recovered below a judgment against Kusterer for the value of a quantity of ice. Kusterer claims that title never passed to Higgins, and that the property was lawfully acquired by himself from one Loder, who cut it on a pond belonging to one Coats and sold it to defendant.

The facts are briefly these: The ice in question was formed upon water which had spread over a spot of low ground partly belonging to Hendrick Coats, forming a basin, the land being dry in summer, and in the rest of the year overflowed from a small brook leading into it. After the ice formed, and in February, 1878, Coats, by a parol bargain, sold all the ice in his part of the basin to Higgins, for fifty cents. The parties at the time stood near by, in view of the ice, and the quantity sold was pointed out, and the money paid. The ice was then all uncut.

About two weeks thereafter John Loder, knowing that Higgins had purchased and claimed the ice, and having been warned thereof by Coats, offered Coats five dollars for the ice, which Coats accepted, and Loder cut it and sold it to Kusterer, who had made a previous verbal contract with Loder for it. Higgins was present when the ice was loaded on Kusterer's sleigh, and forbade the loading and removal, on the ground that he had purchased it from Coats. Kusterer referred the matter to Coats, who said he had sold it to Loder.

The only question presented is whether Higgins was owner of the ice.

The case was argued very ably and very fully, and the whole subject of the nature of ice as property was discussed in all its bearings. We do not, however, propose to consider any question not arising in the case.

The record is free from any complications which might arise under other circumstances. There are no conflicting purchasers in good faith without notice. Loder and Kusterer had full notice of the claims of Higgins before they expended any money. The sale to Higgins was not a sale of such ice as might from time to time be formed on the pond, but of ice which was there already, and which if not cut would disappear with the coming of mild weather and have no further existence. It was not like crops or fruit connected with the soil by roots or trees, through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition would lose its identity by melting. In its frozen condition it drew nothing from the land, and got no more support from it than a log floating on the water would have had.

Its only value consists in its disposable quality as capable of removal from the water while solid, and of storage where it might be kept in its solid state, which could not be preserved without such removal. If left where it was formed it would disappear entirely.

While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a product which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed no skill can join it again to the realty. It has no more organic connection with the estate than anything else has that floats upon the water. Any breakage may sweep it down the stream and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place, or not at all, and can only be kept in existence by cold weather. In the present case the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in a moment convert it into floating masses which no ingenuity of black-letter metaphysics could annex to the freehold.

It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements. Ice has not been much dealt with as property until very modern times, and no settled body of legal rules has been agreed upon concerning it. So far as the principles of the common law go, they usually, if not universally, treated nothing movable as realty unless either permanently or organically connected with the land. The tendency of modern authority, especially in regard to fixtures, has been to treat such property according to its purposes and uses, as far as possible.

The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable when removed from its original place. Its connection, if its position in the water can be called a connection, is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water.

We shall not attempt to discuss cases where the bargain includes future uses of land and water, and interests in ice not yet frozen. Whether such dealings are to be regarded as leases, or licenses, or executory sales, may be properly discussed when they occur. We think the sale in the present case was rightly held to be a sale of personalty.

The judgment must be affirmed, with costs. The other Justices concurred.[9]

## GREENWOOD v. LAW.

(Court of Errors and Appeals of New Jersey, 1893. 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688.)

VAN SYCKEL, J. Law, the plaintiff below, gave to Greenwood, the defendant, a mortgage upon lands in this state for the sum of $3,700. Law alleged that Greenwood entered into a parol agreement with him to assign him this mortgage for the sum of $3,000, and brought this suit to recover damages for the refusal of Greenwood to execute said parol agreement. On the trial below a motion was made to nonsuit the plaintiff on the ground that the alleged agreement was within the statute of frauds. The refusal of the trial court to grant this motion is assigned for error.

Lord Chief Justice Denman, in Humble v. Mitchell, reported in 11 Adol. & E. 205, and decided in 1840, said that no case directly in point on this subject has been found, and he held that shares in an incorporated company were not goods, wares, and merchandise, within the seventeenth section of the statute of frauds. He overlooked the cases of Mussell v. Cooke, reported in Finch, Prec. 533, (decided in 1720,) and Crull v. Dodson, reported in 2 Eq. Cas. Abr. 51, c. 28, Sel. Cas. Ch. 41, (decided in 1725,) in which the contrary view was taken. In the case of Pickering v. Appleby, Comyn, 354, this question was fully argued before the 12 judges, who were equally divided upon it. The cases decided in the English courts since 1840 have followed Humble v. Mitchell. They will be found collected in Benj. Sales (Ed. 1888,) in a note on page 106.

In this country a different rule prevails in most of the states. In Baldwin v. Williams, 3 Metc. (Mass.) 365, a parol contract for the sale of a promissory note was held to be within the statute. In Connecticut and Maine a contract for the sale of shares in a joint-stock company is required to be in writing. North v. Forest, 15 Conn. 400;

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[9] Compare State v. Pottmeyer, 33 Ind. 402, 5 Am. Rep. 224 (1870), in which the court said: "If water in a pool upon one's land be part of the realty, because fixed and stationary, why is it not, when congealed over the bed of the stream, to the thread of which his title extends? True, nature will in time, if it be not removed, again change the ice to fluid, and it will pass away from possession; but not more certainly than the changing winds and the rising tide will sweep away the shifting sands."

Pray v. Mitchell, 60 Me. 430. Chief Justice Shaw, after a full discussion of the subject in Tisdale v. Harris, 20 Pick. (Mass.) 9, concludes that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute of frauds, and, in the absence of the other requisites of the statute, must be proved by some note or memorandum in writing, signed by the party to be charged or his agent. He did not regard the argument that by necessary implication the statute applies only to goods of which part may be delivered as worthy of much consideration. An animal is not susceptible of part delivery, yet undoubtedly the sale of a horse by parol is within the statute. The exception in the statute is when part is delivered; but, if there cannot be a delivery in part, the exception cannot exist to take the case out of the general prohibition.

Bonds and mortgages were expressly held to be goods and chattels in Terhune v. Bray's Ex'rs, 16 N. J. Law, 53. That was an action of trover for a bond and mortgage. Chief Justice Hornblower, in deciding the case, said that, although the attachment act and letters of administration seem to distinguish between rights and credits and goods and chattels, and although an execution against the latter will not reach bonds and notes, yet there is a sense in which, upon sound legal principles, such securities are goods and chattels. This sense ought to be applied to these words in this case. Reason and sound policy require that contracts in respect to securities for money should be subject to the reasonable restrictions provided by the statute to prevent frauds in the sale of other personal property. The words, "goods, wares, and merchandise," in the sixth section of the statute, are equivalent to the term "personal property," and are intended to include whatever is not embraced by the phrase "lands, tenements, and hereditaments" in the preceding section.

In my judgment, the contract sued upon is within the statute of frauds, and it was error in the court below to refuse to nonsuit.[10]

## SECTION 2.—"FOR THE PRICE OF £10 OR UPWARDS"

### HARMAN v. REEVE.

(Court of Common Pleas, 1856. 25 Law J. C. P. 257.)

The declaration stated that, on the 28th of June 1855, in consideration that the plaintiff bargained with the defendant to sell, and then sold to him, a certain mare and foal, and that the plaintiff would, at his own expense keep and feed the said mare and foal for a certain time, to wit, until Michaelmas then next ensuing; and that the plaintiff would, at his own expense, maintain, feed, and keep a certain other mare and foal belonging to the defendant for and during the period of six weeks, the defendant agreed to purchase from the plaintiff the mare and foal first mentioned, and to fetch the same away from the plaintiff's at Michaelmas aforesaid, and pay to the plaintiff the sum of £30. Averment of performance by the plaintiff of all things on his part to be performed; and that all things had happened to entitle the plaintiff to have the contract performed on the defendant's part. Breach, that the defendant did not nor would fetch away the mare and foal so agreed to be purchased and fetched away, or either of them, or pay to the plaintiff the said sum of £30. Special damage.

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[10] In Walker v. Supple, 54 Ga. 178 (1875), and French v. Schoonmaker, 69 N. J. Law, 6, 54 Atl. 225 (1903), a sale of a simple contract debt was held to be within the statute. But compare Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459 (1875).

Plea denying the contract.

The cause was tried, before Jervis, C. J., at the last Spring Assizes for Norfolk, when the plaintiff having proved his case as stated in the declaration, it was objected, on behalf of the defendant, that the contract was not in writing, as required by the 17th section of the Statute of Frauds; whereupon his Lordship nonsuited the plaintiff, and reserved leave to him to move to enter a verdict for £30.

Jervis, C. J. I am of opinion that this rule should be discharged. It is now well settled that the 7th section of Lord Tenterden's Act, 9 Geo. IV, c. 14, and the 17th section of the Statute of Frauds are to be read together, and the enactments of the latter statute are extended to all contracts for the sale of goods of the value of £10. and upwards. The effect of that is to substitute the word "value" for the word "price" in the 17th section of the Statute of Frauds, so as to adopt one uniform rule in all cases, and the 17th section must now be read, "no contract for the sale of any goods, &c. of the value of £10. or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made," &c. Now, the present is the case of a contract for the sale of goods above the value of £10., for there is no doubt that the plaintiff's mare and foal were worth more than £10.; and although that may not very distinctly appear upon the face of the contract, still it might and would have been shown by parol evidence. Then, it is a contract for the sale of the plaintiff's mare and foal above the value of £10.; and it is not the less so because something else is included in it, and there is no note or memorandum in writing. Prima facie, therefore, the case is within the statute, the principal subject-matter of the contract being the sale of the plaintiff's mare and foal to the defendant, the rest being merely ancillary to it; but even if this be not so, it is still a contract for the sale of goods above the value of £10., and, as such, I think cannot be enforced.

But then it is argued that there has been an acceptance, which takes the case out of the statute. I think not, for there has been no acceptance of the "goods so sold"—that is, of the plaintiff's mare and foal —but the defendant has had the enjoyment of something else engrafted upon the contract, and that does not satisfy the statute. And there is no hardship in our so deciding, for the plaintiff is still at liberty to recover for the price of the agistment of the defendant's mare and foal. The answer given to this suggestion by Mr. Couch is, that the plaintiff would not have contracted for the agistment of the defendant's mare and foal, unless the whole contract had been entered into, and that it is unfair that he should recover for part only. But that is a sort of thing that occurs daily. I agree to let a house to a man for a term of years, and he enters under the promise of a lease and occupies for a year, when I sue him for use and occupation. It would be no answer for him to say, "I should not have entered at all, unless you had agreed to grant me a lease." If entitled to a lease, it is his own fault if he does not get it; and it is no reason because, by his own fault, he has failed to get all he was entitled to, that he should not pay for what he has had.

In this case the plaintiff may recover for the agistment of the defendant's mare and foal when he properly sues for it; but he cannot recover the price of his own mare and foal. "It by no means follows," as said by Bayley B., "because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good."

Rule discharged.[11]

## WEEKS v. CRIE et al.

(Supreme Judicial Court of Maine, 1900. 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410.)

Assumpsit to recover damages for nondelivery of a quantity of fish, which the plaintiff alleged he purchased of the defendants under an oral contract. The defendants denied the contract, and invoked the statute of frauds.[12]

SAVAGE, J. At the trial of this case the plaintiff claimed, and introduced evidence tending to show, that the defendants in November, 1898, orally agreed to sell him from three to five hundred drums of hake at $1.65 per kentle, to be delivered at Rockland when called for by him, and at the same interview agreed to sell him ten barrels of split herring at $4.25 per barrel, to be delivered in Rockland by next boat from Criehaven, which would be within one week; that he (the plaintiff) orally agreed with the defendants to purchase the hake and the herring upon these terms. It was admitted by the defendants that they sold the herring to the plaintiff as claimed, and that they were delivered according to the agreement, and paid for by the plaintiff. The plaintiff in January, 1899, demanded 300 drums of hake to be delivered in accordance with the alleged agreement, but the defendants refused to deliver them; and to recover damages for that alleged breach of contract this action was brought.

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[11] Concurring opinions were delivered by Williams and Crowder, JJ.

[12] The statement of facts is abridged and part of the opinion is omitted.

The defendants denied that they agreed to sell any hake to the plaintiff. But the jury, under instructions to which no exceptions were taken, have found they did make such a contract. In this contingency the defendants claim that, if any such contract of sale was made, it was oral merely, and, being for more than $30, it was invalid under the statute of frauds. The case shows that no memorandum was made, and nothing was given in earnest to bind the bargain; and the defendants claim that no part of the goods sold were accepted and received by the purchaser, so as to bind the defendants to deliver the hake. * * *

The plaintiff, however, contends that the contracts for the hake and the herring constituted in fact but one entire contract for hake and herring, and that his acceptance and receipt of the herring, a part of the merchandise contracted for, took the sale out of the statute as to the whole. The defendants admit the "delivery" of the herring, and we understand from that admission that they also admit that the herring were accepted and received by the plaintiff. The phrase "delivered by the seller" is frequently used in such cases in the sense of "accepted and received by the purchaser," and not unnaturally, for a receipt by the purchaser necessarily presupposes a delivery by the seller. This is not entirely accurate, however, for the statute makes acceptance and receipt by the purchaser the test of the removal of the statutory bar.

Now, if there were two separate contracts of sale, one for the herring and one for the hake, it is clear that the acceptance and receipt of the herring did not take the contract for the hake out of the statute, for an acceptance under one contract cannot make another contract valid. But if there was in fact only one contract, for both herring and hake, negotiated for, it may be, successively, a delivery followed by an acceptance and receipt of the herring did take the hake out of the statute. It is unquestionably the law in such case that an acceptance and receipt of part of the articles purchased, or of all of one class of articles purchased, necessarily takes the whole contract out of the statute. Elliott v. Thomas, 3 Mees. & W. 170. So that, if the contract in this case was single and entire, it was proper for the presiding justice to rule that the delivery of the herring took the hake out of the statute. For, although the question whether there is an acceptance and receipt under the contract is ordinarily for the jury, yet in this case the admission that the herring was so accepted carried with it, necessarily, the contract as to the hake, provided only that it was a single contract. There was nothing left on this point for the jury to decide.

But this conclusion follows only upon the assumption that there was but a single contract. The application of the statute of frauds in case of the purchase of a number of articles at the same transaction may depend upon whether there is one contract or more. The mere fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference, so long as the different purchases are so connected in time or place, or in the conduct of the parties, that the whole may be fairly considered as one transaction. Browne, St. Frauds, § 314; Baldey v. Parker, 2 Barn. & C. 37; Scott v. Railway Co., 12 Mees. & W. 33. Such is the common case of a number of articles purchased at private sale of a shopman, for instance, at the same time, though at separate prices. Browne, St. Frauds, §§ 335, 336. The same doctrine was applied in a case where the parties made bargains for the purchase and sale of several lots of timber at different places, some miles apart; the bargains being made at the different places and at separate prices, but all on the same day. Biggs v. Whisking, 14 C. B. 195. Such purchases may be regarded as entire, though composed of separate parts.

But whether such negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances. It raises a question of fact properly to be passed upon by a jury. Were the transactions near in time or place or similar in circumstances? What was the conduct of the parties? Was the seller a merchant engaged in the regular course of his business in his shop or store? What was the language used? What are the proper inferences to be drawn as to the intention of the parties? The answers to these and other like questions solve the problem. If the circumstances are such as to lead to a reasonable supposition that the parties intended that the whole series of transactions should constitute one trade, they may be regarded as one entire contract; otherwise, not.

Now, in the case at bar, the jury were instructed, in effect, that, if the two contracts for sale were made at the same interview, that would be sufficient. We think this ruling was erroneous. Even if there were no other facts or circumstances to be considered, which is hardly supposable, it cannot be said, as a matter of law, that the mere fact that the negotiations for the herring and the hake were made at the same interview resulted in a single contract. They may have constituted one contract only, and they may not. If not, then the hake were not taken out of the statute by the acceptance of the herring. Whether the negotiations constituted one contract or more was a question of fact, and should have been submitted to the jury.

Exceptions sustained.[13]

## SECTION 3.—"SHALL BE ALLOWED TO BE GOOD"

### MAHAN v. UNITED STATES.

(Supreme Court of United States, 1872. 16 Wall. 143, 21 L. Ed. 307.)

Appeal from the Court of Claims; the case as found by that court, from the evidence, being thus:

One Mitchell, of Mississippi, being indebted to his step-daughter, of whose estate he had been the guardian, mortgaged, with his wife (the mother of the step-daughter mentioned), a life estate which the wife had in a valuable cotton farm in Mississippi, near the river of that name; and soon afterwards died. Mrs. Mitchell, his widow, became administratrix of his estate. In 1861 the rebellion broke out. There were at this time one hundred and sixteen bales of cotton on the farm; and the war being flagrant in Mississippi, the Confederate general ordered all cotton near the river, under penalty of being burnt, to be removed from it, in order to prevent its capture by the forces of the United States.

In compliance with this order, Mrs. Mitchell removed the cotton to Kingston, near Natchez, where it was stacked and covered. "After the cotton had been thus removed to Kingston, but before the capture of Natchez by the United States forces, and before the passage of the Abandoned and Captured Property Act, a parol agreement was made between Mrs. Mitchell and her daughter, now like herself a widow, to the effect that the latter should take the cotton as a payment upon the mortgage before described. The price was fixed at twenty cents per pound, but the number of pounds was not definitely ascertained, neither was any payment indorsed upon the mortgage, nor any receipt given, nor any memorandum in writing made, nor any present consideration paid. Neither did any change of possession take place, nor was there any delivery, actual or symbolic. The cotton remained at Kingston until its seizure by the military forces of the United States, immediately upon which the daughter asserted that she was the owner, and sought to procure its release."

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[13] As to successive sales of several articles or lots to one purchaser by auction, compare Emmerson v. Heelis, 2 Taunt. 38 (1809), and Jenness v Wendell, 51 N. H. 63, 12 Am. Rep. 48 (1871).

Not succeeding in this, and the cotton being sold, and the Captured and Abandoned Property Act being passed, which allowed loyal owners of property captured in the South and so disposed of, to apply to the Court of Claims for the proceeds, the daughter (now re-married to one Mahan) filed with her husband a petition in the court just named, to have the money which, on sale of it, the cotton had brought. The Court of Claims said:

"The party relies upon a purchase and sale at which, so far as the evidence shows, she paid no money, relinquished no rights, released no debt, assumed no responsibility, and acquired no possession. The intent of the parties was not evidenced by the payment of the purchase-money, nor by the ascertainment of the price, nor by a receipt upon the mortgage, nor by a written memorandum between the parties, nor by any formal or decisive declaration before witnesses, nor by the delivery of the thing sold. The facts do not, in law, establish a sale and delivery, and the evidence to prove the ownership of the captured property fails."

The court accordingly dismissed the petition, and from that dismissal this appeal came.

Mr. Justice MILLER. The sole question in the case is, whether the appellant was the owner of the cotton at the time of its seizure by the agents of the United States, and this must be decided as a matter of law on the finding of facts made by the Court of Claims, notwithstanding the frequent reference by the counsel of the appellant to the view which he takes of the evidence given in that court.

It is strongly urged by the counsel that, by the common law, the facts as found by the court, constituted a valid sale of the property, and that, as there was no statute of frauds in force in the State of Mississippi requiring delivery or a written memorandum to make a sale of personal property valid, the parol agreement set out in this finding constituted a valid sale. Whether this would be so in the absence of such a statute as most of the States have on that subject, might admit of serious debate.

But, while there is no such provision in the authorized publication of the statutes of Mississippi of 1840 by Howard and Hutchinson, to which we have been referred, we find in the Revised Code of Mississippi of 1857, which, from our own researches, we are bound to believe was the law in force when this agreement was made, a very stringent provision on this subject in the statute of frauds and perjuries of that code.

Article 4 of chapter 44 (page 359) enacts that no contract for the sale of any slaves, personal property, goods, wares, and merchandise for the price of fifty dollars or upwards shall be allowed to be good and valid, except the buyer shall receive the slaves, or part of the personal property, goods, wares, and merchandise, or shall actually pay or secure the purchase-money, or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized.

The finding of the Court of Claims negatives in the most express terms the existence in the agreement, by which the title of the cotton was supposed to be transferred, of each and every one of the acts or conditions, some one of which is by that statute made necessary to the validity of the contract.

To hold that an agreement which that statute declares shall not be allowed to be good and valid was sufficient to transfer the title of the property to the claimant, would be to overrule the uniform construction of this or a similar clause in all statutes of frauds by all the courts which have construed them.

The Court of Claims held that the agreement passed no title, and we concur in their conclusion on that subject.

It is unnecessary to examine into the effect of the transaction as a gift inter vivos. The finding that there was no delivery would be as fatal to such a gift as to the agreement of sale. Besides there is nothing in the petition of the plaintiff, or in the findings of the Court of Claims, on which such a gift could be considered as in the issue. The finding that it was a parol contract of sale is directly opposed to the idea of a gift.

Decree affirmed.[14]

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[14] Compare Briggs v. United States, 143 U. S. 346, 12 Sup. Ct. 391, 36 L. Ed. 180 (1892).

In Waite v. McKelvy, 71 Minn. 167, 73 N. W. 727 (1898), which was an action to recover possession of a carload of wheat and other grain, formerly the property of the plaintiff's son, but sold to the plaintiff, as she claimed, before it was levied upon by the defendant, as sheriff, by virtue of a writ of attachment issued against the son, the court said "that the rule, relied on by the plaintiff, to the effect that the defense of the statute of frauds is personal to the parties to the verbal contract, and cannot be invoked by third parties, has no application to this case, for the defendant, as sheriff, has, by virtue of his levy, all of the title and right to the property that the seller had, if any, at the time the levy was made. If the verbal contract had not been so far performed as to satisfy the statute, the verbal contract was, in the language of our statute, void, and no title passed to the buyer as against the sheriff. To permit the parties to the verbal contract, after the levy, to waive the statute would encourage perjuries, and, as was said in Ely v. Ormsby, 12 Barb. (N. Y.) 570, 'open wide the doors for frauds, and be a very convenient method of enabling a party to put off his creditors.' This proposition is supported by the commanding weight of authority. The adjudged cases on the question are collected and analyzed in Browne, St. Frauds (5th Ed.) pp. 173-178. The author, however, while admitting that the rule that where there has been no satisfaction of the statute up to the time when the right or liability of a third party accrues, the verbal contract cannot be enforced, is strongly sustained by authority, questions it on principle, on the ground 'that the statute does not make the contract void, but only allows a defense to its enforcement, which defense is personal to the defendant, and may be waived by him.' It is to be noted, in this connection, that the original statute, and that of several of the states, unlike our own, do not declare the verbal contract void, but provide 'that no such contract shall be allowed to be good' except the statute is satisfied. Order reversed, and a new trial granted."

## AMSINCK et al. v. AMERICAN INS. CO.

## SAME v. BOYLSTON MUT. INS. CO.

## SAME v. NEW ENGLAND MUT. INS. CO.

(Supreme Judicial Court of Massachusetts, 1880. 129 Mass. 185.)

Three actions of contract upon policies of marine insurance. At the trial in this court, before Morton, J., the jury returned a verdict for the plaintiffs; the case was reported for the consideration of the full court, and appears in the opinion.

Endicott, J.[15] Upon the facts reported, the court is of opinion that Machado had an insurable interest in the vessel at the time the policies attached, even if we assume that they took effect on July 5, 1876, the day of their date. On that day, the plaintiffs, as agents for Machado, made an oral agreement in New York with the owners of the vessel for her purchase for the sum of $11,000, payable on delivery of a proper bill of sale; and, having previously ascertained that the defendants would insure her, they gave directions to have the insurance closed. The policies were written on that day; the precise time of their delivery does not appear. The oral contract to purchase was reduced to writing and signed by the plaintiffs and the owners on July 7; and a portion of the purchase money was paid on that day. Possession was taken by Machado, the balance due was paid, and a bill of sale was duly executed to a third person in trust for Machado, who was a foreigner.

It is conceded by the defendants that Machado was the only person whose interest was insured, as appears by the declarations and the policies. But they contend that he had no insurable interest on July 5, for at that time he had only an oral contract for the purchase of the vessel; and that such a contract, being within the statute of frauds, and incapable of being enforced, gives no insurable interest.

But the oral contract to purchase was not void or illegal by reason of the statute of frauds. Indeed, the statute presupposes an existing lawful contract; it affects the remedy only as between the parties, and not the validity of the contract itself; and where the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is therefore to be "treated as a valid subsisting contract when it comes in question between other parties for purposes other than a recovery upon it." Townsend v. Hargraves, 118 Mass. 325, 336; Cahill v. Bigelow, 18 Pick. 369; Beal v. Brown, 13 Allen, 114; Norton v. Simonds, 124 Mass. 19. See, also, Stone v. Dennison, 13 Pick. 1, 23 Am. Dec. 654. Machado had under his oral agreement an interest in the vessel, and would have suffered a loss by her injury or destruction. Eastern Railroad

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[15] Part of the opinion is omitted.

v. Relief Ins. Co., 98 Mass. 420. This interest he could have assigned for a valuable consideration, and, if he had assigned it, all the rights afterwards perfected in him would have enured to the benefit of his assignee. Norton v. Simonds, ubi supra. The case of Stockdale v. Dunlop, 6 M. & W. 224, relied upon by the defendants, does not sustain their position, for reasons which are stated in Townsend v. Hargraves, supra. * * *

Verdicts set aside.

## JACKSON et al. v. STANFIELD et al.

(Supreme Court of Indiana, 1894. 137 Ind. 592, 37 N. E. 14, 23 L. R. A. 588.)

An action for wrongfully preventing the plaintiff Newton Jackson from performing a contract to sell a certain quantity of lumber to the Studebaker Bros. Manufacturing Company.

DAILEY, J.[16] * * * It is urged that the contract between the Studebaker Bros. Manufacturing Company and appellant Newton Jackson is void under the statute of frauds, because the value of the lumber was over $50, and the finding does not show that the offer was accepted in writing. If this be true, it is no concern of the appellees. Parties to contracts and their privies can alone take advantage of the fact that a contract is invalid under the statute of frauds. Many forms of expression by this and other courts illustrate the doctrine that a third person cannot make the statute of frauds available to overthrow a transaction between other persons; that the defense of this statute is purely a personal one, and cannot be made by strangers. Burrow v. Railroad Co., 107 Ind. 432, 8 N. E. 167; Bodkin v. Merit, 102 Ind. 293, 1 N. E. 625; Cool v. Peters Box, etc., Co., 87 Ind. 531; Dixon v. Duke, 85 Ind. 434; Wright v. Jones, 105 Ind. 17, 4 N. E. 281; Savage v. Lee, 101 Ind. 515; 8 Am. & Eng. Enc. Law, 659, and cases cited. It concerns the remedy alone, and the modern law is well settled that, in the absence of a statutory provision to the contrary, the effect of the statute is not to render the agreement void, but simply to prevent its direct enforcement by the parties, and to refuse damages for its breach. 8 Am. & Eng. Enc. Law, 658, 659, and cases cited. * * *

## TAYLOR v. GREAT EASTERN RY. CO.

(Court of Appeal, Queen's Bench Division. [1901] 1 K. B. Div. 774.)

Trial in the Commercial Court before Bigham, J.

On October 19, 1900, a firm of Barnard Brothers sold to one Sanders a quantity of barley at the price of £68. 5s. on rail at Elsenham Station on the defendants' railway. Messrs. Barnard gave to Sanders an invoice containing the terms of the contract in the following form: "Newport, Essex. October 19, 1900. Mr. George Sanders. Bought of Barnard Brothers. Per on rail at Elsenham to your order, 52 Qrs. 4 bus. barley at 26s., 68 lbs. 5s." There was no memorandum in writing of the contract signed by Sanders. On October 24 Messrs. Barnard gave a written order to the defendants directing them to transfer the barley to Sanders: and thereupon the defendants sent to Sanders an advice-note informing him that the barley was at the station awaiting his order. After receiving this advice-note Sanders tried to resell the barley, using for the purpose a sample obtained from Barnard Brothers, but he did not succeed in finding a purchaser. He never inspected or sampled the bulk at the railway station. Towards the end of November Sanders committed an act of bankruptcy on which he was subsequently adjudicated, and the plaintiff was appointed trustee. On or about November 30 Messrs. Barnard, as unpaid vendors, claimed to stop the goods in transitu, and demanded the barley from the defendants, who gave it up to them. The plaintiff then sued the defendants for conversion.

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[16] Part of the opinion is omitted.

BIGHAM, J. In this case one of the defences [17] relied upon by the defendants was that although Barnard Brothers had signed a sufficient memorandum of the contract of sale within the meaning of section 4 of the Sale of Goods Act, Sanders had not; and it was said that he had neither paid any part of the price (which was true) nor accepted any part of the goods. In these circumstances it was argued, as I understand, that the property in the goods had not passed from Barnards to Sanders, and that, therefore, Barnards were entitled to possession. I may say at once that this contention, whatever it may be worth in law, is not well founded in fact. I am of opinion that the goods had been accepted by Sanders. He had certainly received them, though, of course, receipt does not necessarily involve acceptance. But after receiving them he had obtained a sample, not, it is true, by drawing it from the bulk at the station, but by asking the vendors to let him have a sample which was in their possession. By means of this sample he had tried to sell the goods. He had, moreover, kept them for a month.

These circumstances, in my opinion, amount to an acceptance. The words in section 17 (now repealed) of the Statute of Frauds were, "except the buyer shall accept part of the goods so sold and actually receive the same." Many cases are to be found in the reports dealing with the meaning of these words, but it is unnecessary to examine them: their effect is to be found sufficiently and, in my opinion, accurately stated on pages 149, 150 of the 3d edition of Mr. Chalmers' book on the Sale of Goods Act, and that new Act contains what the Statute of Frauds did not contain—a definition of the word "acceptance" in this connection. Section 4, subsec. 3, provides that "there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." Now, I think there could not be a clearer act recognising a pre-existing contract of sale than the attempt by Sanders to resell. If he had in fact resold, would that not have been sufficient? And if an actual sale, then why not also an attempt to sell? Can any one suppose that Sanders could have successfully resisted an action for the price?

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[17] Another question which was argued was whether the transitus of the goods was not at an end. But as the decision on the point turned entirely upon a question of fact, that portion of the judgment has been omitted from this report.

The defendants referred to and relied on a decision under the old Act in 1892: Taylor v. Smith (1893) 2 Q. B. 65. That case was dealt with by the Court as merely involving a question of fact. This appears from an examination of the judgments. I see by a foot-note that the case was reported about a year after it was decided "in deference to representations from various quarters." I think the editor would have done well to have resisted those representations, for the case declares no principle of law and is, in my opinion, of no general application. It was held there that the buyer did not by looking at the goods at the wharfingers, and by saying "I reject them," in fact accept them. For my part I agree; but it by no means follows that I think in the present case that the buyer did not accept the goods. I think he did; and I think, therefore, that, though there was no memorandum in writing signed by Sanders, the provisions of the statute were sufficiently complied with to make the contract of sale binding upon him.

The view which I take of the facts makes it unnecessary to consider the point of law, but I should like to say a word or two about it and about the case of Nicholson v. Bower, 1 E. & E. 172, which was cited by Mr. Lush in support of it. I think that the absence of a memorandum in writing, and of the other conditions mentioned in section 4, subsec. 1, of the Sale of Goods Act, does not make a contract void or even voidable. The contract is good. The only effect of the non-fulfilment of the statutory conditions is that it is unenforceable. And, the contract being good, all the legal consequences of a contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer. It may be asked, What happens if the buyer, after making the purchase, refuses to fulfill any of the statutory conditions which alone will make the contract enforceable against him? The property in the goods has passed to him, and it may be that he has received the goods themselves, yet he cannot be sued for the price. My answer is that the seller may call on the buyer to pay for the goods, and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller and to entitle him to resume possession.

As to the case of Nicholson v. Bower, 1 E. & E. 172, it was an issue to try whether certain wheat was the property of the plaintiff, who was the assignee of one Pavitt, a bankrupt, or the property of the defendant who had sold the wheat to Pavitt. Pavitt had not complied with the requirements of the statute, so that the contract of sale never was enforceable against him, and it seems to have been decided that on this ground there was no binding contract between the vendor and the vendee, and that, therefore, the property never legally vested in the buyer. If that is the true ground of the decision, I do not think it was right, nor do I think it is in accordance with the later cases decided under the statute. The seller had sold the goods and was clearly bound by the contract, and the buyer had bought the goods although he could not be sued for the price if he chose to insist on the statutory defence. In such circumstances it would not be true to say that the property had not passed. I think, however, upon a careful examination of the facts of the case, the decision may be justified on the supposition that before the assignee's title could be said to have arisen the vendor and the vendee had rescinded the contract so that the property had revested in the former; and this appears to have been the ground upon which the judgment of Erle, J., proceeded. There must be judgment for the plaintiff.

Judgment for the plaintiff.

## SHELTON et al. v. THOMPSON et al.

(Court of Appeals at Kansas City, Mo., 1902. 96 Mo. App. 327, 70 S. W. 256.)

BROADDUS, J. This suit originated in a justice's court, where trial was had, appeal taken to the circuit court of the county, where on trial anew the plaintiff recovered judgment, which the court on motion for a new trial set aside, from which action of the court in setting said verdict aside the plaintiffs appealed. The action is replevin to obtain the possession of 15 hogs, of which it is alleged the plaintiffs were the owners, and which the defendants unlawfully withheld. It appears that the parties to the suit are stock-shipping firms doing business at Spickards, Grundy county, Mo.; that on September 2, 1901, J. N. Sires, acting for plaintiffs, went to the farm of one Richard Bain, some distance from said town, and contracted with said Bain, the owner, in behalf of plaintiffs, for said hogs, at the price of $5.37½ per hundredweight, said Bain agreeing to deliver them on September 14th next, at the stock yards of the Rock Island Railroad in said town of Spickards. At the time of the said agreement these particular hogs were selected by Sires and Bain from other hogs of Bain which were in the same pen. There was no writing signed by the parties, and no money paid. On said

Wednesday said Bain placed the hogs in said stock yards. At about 8 o'clock a. m., after the hogs had been put in the pens, Sires appeared, and wanted Bain to have the hogs weighed. But it was shown that Bain was not willing to weigh the hogs to plaintiff because Sires had not come sooner for that purpose, he (Bain) claiming that they had shrunk in the meantime, and that to meet this shrinkage the plaintiffs should pay him a larger price per hundred. This Sires, one of the plaintiffs, refused to do. It appears that defendants' purchasing agent had offered Bain 10 cents more per hundred than the agreed price aforesaid; and when Bain asked Sires to pay this additional price, which had been offered by Griffin, who was defendants' purchasing agent, he (Sires), according to Bain's evidence, "just turned around, and says, 'you sell them to him.'" Bain did sell to Griffin for defendants, the hogs, whereupon the plaintiffs, on the 5th of said month, instituted these proceedings.

One contention of the defendants is that, as there was no writing evidencing the agreement between Bain and the plaintiffs, signed by the parties, and no money paid, the value of the animals in dispute being over $30, the plaintiffs were not entitled to recover. If the acts of the parties constituted a sale at law, the transaction was not void, but only voidable at the election of the party to be charged. Aultman v. Booth, 95 Mo. 386, 8 S. W. 742; Maybee v. Moore, 90 Mo. 343, 2 S. W. 471. "And it may also be said that, as the statute of frauds affects only the remedy of the party sought to be charged, its benefits cannot be claimed by one who is not a party to the contract, and is not sought to be charged thereby." Railway Co. v. Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751. But we hold that the defendants are not within the above rule for the reason that their vendor, Bain, voided the contract in the first instance by refusing to let plaintiffs have the hogs in dispute. It would be illogical to hold that, after a vendor had repudiated an oral contract like the one in question, he could not thereafter sell the goods and give good title; that is to say, that thereafter he must keep the goods because a purchaser could not be found, for the reason that they could be taken from him by the original vendee, which would destroy their character as articles of merchandise. But it is plain that when the vendor voids a sale under said statute, and retains the goods, his title is as if no such sale had ever been made, and he can resell and give as good a title as his own to the purchaser, who can, at a suit by the first vendee for the same goods, plead the action of the vendor as a bar to such suit.

But as these proceedings were instituted in the justice's court, the defendants were not required to state their defense in writing. The record fails to state the substance of any oral plea made by defendants, but we are enabled to gather that they relied upon the fact that they were the owners of the property in controversy by reason of their purchase from Bain, and that plaintiffs got no title under their said contract with him because it was not reduced to writing, no money paid, and no delivery of the hogs. Plaintiffs contend that defendants could not avail themselves of the statute of frauds unless it was pleaded as a defense. This would be true if the plaintiffs themselves had pleaded a contract, but this they did not and were not required to do, and it follows, therefore, that defendants were not required to set up the statute of frauds to an unpleaded contract. Under a denial of plaintiffs' title it was permissible for them to show that the contract under which plaintiffs sought to recover was voidable under the statute of frauds, and that such contract had been repudiated and rendered nugatory by the action of their vendor, Bain, as has been already said.

But it is contended by plaintiffs that, independent of all these questions, there was an actual delivery of the goods. It is conceded that a contract was made between Bain and plaintiff in reference to the hogs, and their identity ascertained. The only point to determine, then, is, "was there a delivery"? If there was a delivery, the statute of frauds has nothing to do with the case, and the plaintiffs were entitled to recover. Browne, St. Frauds, § 317, reads: "Where by the terms of the contract the sale is to be for cash, or any other condition precedent to the buyer's acquiring title to the goods be imposed, or the goods be, at the time of the alleged receipt, not fitted for delivery according to the contract, or anything remains to be done by the seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer. There must be first a delivery by the seller, with intent to give possession of the goods to the buyer." Property of the character in dispute was capable of the actual transfer of the possession from the buyer to the seller.

It is contended by plaintiffs that, as the contract provided that the hogs should be delivered at the stock pens of the Rock Island Railroad at Spickards, the fact that Bain took and put them in said pens constituted delivery. A similar contention was made in Harvey v. Association, 39 Mo. 212. The facts in that case were: "The price [per head] and the number of cattle were agreed upon, and they were to be driven by the plaintiff to Dresden, a station on the Pacific Railroad, and delivered into the cattle pens at that place on the last of September, and they were driven by plaintiffs' agent to Dresden, and put into the stock pens on that day, but there was nobody there to receive them on behalf of the defendants, and they were driven away again to a herding place by the same agent." The court held that there was no delivery, no actual change of possession; that "a delivery of possession necessarily implies a change of dominion and control over the property." Here the hogs were delivered at the stock yards as agreed, but there was no one there at the time to weigh and receive them, and when one of the plaintiffs came to receive them the vendor refused to deliver them to him. Bain never parted with his possession of the hogs, but held control of and dominion over them until he sold and delivered them to the defendants.

Under the undisputed facts in the case the plaintiffs were not entitled to recover, and the court was fully justified in setting the verdict aside on grounds 1 and 11 mentioned in defendants' motion for a new trial.

Cause affirmed. All concur.

## GREEN et al. v. LEWIS.

(Court of Queen's Bench of Upper Canada, 1867. 26 U. C. Q. B. 618.)

Action for non-delivery of a quantity of oil. By agreement the plaintiff took a verdict for $300 damages, subject to the opinion of the Court, who might, at the plaintiff's election, order either a nonsuit or a verdict for the defendant.[18]

HAGARTY, J. * * * If the defendant's contention that no valid contract exists be right, we could easily dispose of the case. He relies on the 17th Section of the Statute of Frauds. The plaintiffs answer this by proof that by the law of Illinois the "lex loci contractus," no writing is required. As is alleged, the defendant through his agent made a contract in Illinois at Chicago, to sell to the plaintiffs, who resided there a quantity of oil, to be delivered by the defendant, a resident of Toronto, at Toronto to the Grand Trunk Railway Company, to be carried by them to Chicago, the price payable in Toronto.

By Canadian law such a contract must be evidenced by writing. The bought note produced at the trial, made by the broker, was shown to have been really made in January, 1866, after this action was commenced, and therefore insufficient. Bill v. Bament, 9 M. & W. 36, cited by Willes, J., in Williams v. Wheeler, 8 C. B. N. S. 313, and again in Gibson v. Holland, L. R. 1 C. P. 1.

The question chiefly argued before us was which law was to govern, our own or that of Illinois.

In the Peninsular and Oriental Steam Co. v. Shand, 12 L. T. Rep. N. S. 809, in the Privy Council, Lord Justice Turner, after noticing the conflict of authority, says, in delivering the judgment of the Court: "The general rule is, that the law of a country where the contract is made governs as to the nature, the obligation and interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed de jure, and a foreign Court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

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[18] The statement of the case is substituted. The facts sufficiently appear in the opinion. Part of the opinion is omitted.

The contract there was to carry goods made in England, (with a clause exempting the carrier from liability in certain cases) thence to the Mauritius; and the judgment of the Privy Council held that the contract as made in England was to govern, not the law of the place of delivery, by which latter law the carrier could not have been so protected.

In the much discussed case of Leroux v. Brown, 12 C. B. 801, it was held, in substance, that there is a distinction between the 4th Section of the Statute, which enacts that no action shall be brought upon any agreement which is not to be performed within a year, unless in writing, &c., and the 17th section, which declares that no contract for the sale of goods for £10. or upwards shall be allowed to be good, &c.: that the 4th section applies not to the validity (or, as it is called, the "solemnities") of the contract, but only to the procedure; and therefore that the plaintiff could not maintain an action in England on a verbal contract extending over a year in France, where no writing was required; that the remedy may exist in France, though not enforceable in England. But the 17th section was considered to avoid the contract altogether, therefore to affect the "solemnities"; and therefore a verbal contract good where made can be enforced in an English Court, notwithstanding its coming expressly within the 17th section.

This decision is strongly questioned by Willes, J., in Williams v. Wheeler, 8 C. B. N. S. 316. He says: "I cannot help observing that I should require much more argument to satisfy me that a contract made in France without writing, which is valid by the French law, is incapable of being enforced in an English Court, by reason of the requirements of the English law as to the formalities of contracts made in England. The general rule is that locus regit actum. And, although I fully recognize the rule upon which the judgment of this Court in Leroux v. Brown professes to be founded: viz., that the procedure is regulated by the lex fori, I am not satisfied that either of the sections of the Statute of Frauds to which reference has been made warrants the decision."

This doubt as to Leroux v. Brown, repeated in Gibson v. Holland, does not, however, help the objections taken by the defendant.

It was also argued that, as the contract was to be performed in Toronto by the delivery of the goods to the carrier and by payment there, the law of the place of performance should govern. On this subject Sir George Turner says, in the judgment already cited: "Every one who is but moderately familiar with the text books and decisions must know how easy it is to produce authorities on either side, when the question is by what law to interpret a contract in one country, and to be performed, wholly or partly, in another; but if these be carefully examined, it will be found, after all, that the same general principles have for the most part prevailed throughout, and that where the conclusions vary, they do so from distinctions more or less minute in the facts."

It may well be that if any part of the contract to be performed in England would be in itself contrary to or in violation of our law, our Courts would refuse to enforce it, even if shown to be legal by the lex loci contractus. See Robinson v. Bland, 2 Burr. 1077; Grell v. Levy, 16 C. B. N. S. 73; and the subject discussed, Story, Conflict of Laws, §§ 279, 280; 2 Kent, Com. 458; Tudor, Lea. Cas. Merc. L. 213.

But we have seen no case in which, if the parties had bound themselves by a contract lawful and obligatory in the place of making, its performance in another country would be refused, because certain solemnities required by the law of the latter had not been observed in its original creation.

If the parties have once bound themselves lawfully for any universally lawful purpose, such as here for the sale of goods at a fixed price, it appears to us that our Courts must hold them bound here as they would be in the place of contract.

We think, on the whole, the rule must be discharged.

Rule discharged.[19]

## BIRD et al. v. MUNROE.

(Supreme Judicial Court of Maine, 1877. 66 Me. 337, 22 Am. Rep. 571.)

PETERS, J.[20] On March 2, 1874, at Rockland, in this state, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered, (by immediate shipments,) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, ante-dating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24,) by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

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[19] See Hunt v. Jones, 12 R. I. 265, 34 Am. Rep. 635 (1879).

[20] The statement of facts is omitted.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and antedated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the 24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the res gestæ. Benjamin on Sales, § 213; Stoops v. Smith, 100 Mass. 63, 66, 1 Am. Rep. 85; and cases there cited.

Then, the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date, (March 2,) although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale or any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this state, the consideration for the promise is not required to be expressed in writing. Gillighan v. Boardman, 29 Me. 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J., (Marsh v. Hyde, 3 Gray [Mass.] 331,) "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The locus pœnitentiæ remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps, most instances such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is per se the contract of the parties. In many cases, as for instance, like the antedating of the deed in Egery v. Woodard, 56 Me. 45, cited by the defendant, the contract, (by deed,) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S. c. 111, § 4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all.

The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4,) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised in 1857, without any legislative intent to make an alteration in the sense of the section. (R. S. 1841, c. 136, § 4.) The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Browne, St. Frauds, §§ 115, 136, and notes to the sections; Benjamin's Sales, § 114; Townsend v. Hargraves, 118 Mass. 325; and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of Townsend v. Hargraves, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. Vincent v. Germond, 11 Johns. (N. Y.) 283, is to the same effect.

We are not aware of any case where the question has been directly adjudicated adversely to these cases. Webster v. Zielly, 52 Barb. (N. Y.) 482, in the argument of the court, directly admits the same principle. The case of Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140, seems also to be an authority directly in point. Thompson v. Alger, 12 Metc. (Mass.) 428, 435 and Marsh v. Hyde, 3 Gray (Mass.) 331, relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expression in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there·are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication: Such as, that the statute does not apply where the contract has been executed on both sides, Bucknam v. Nash, 12 Me. 474; that no person can take advantage of the statute but the parties to the contract, and their privies, Cowan v. Adams, 10 Me. 374, 25 Am. Dec. 242; that the memorandum may be made by a broker, Hinckley v. Arey, 27 Me. 362; or by an auctioneer, Cleaves v. Foss, 4 Me. (4 Greenl.) 1; that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale, Davis v. Moore, 13 Me. 424; or several days after, Bush v. Holmes, 53 Me. 417; or ever so long after, Browne, St. Frauds, § 337, and cases there noted; that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained, Haynes v. Nice, 100 Mass. 327, 1 Am. Rep. 109; that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract, Leroux v. Brown, 12 C. B. 801; but this case has been questioned somewhat; that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received, Howard v. Sexton, 4 N. Y. 157; that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards, Maclean v. Dunn, 4 Bing. 722; that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed, Gale v. Nixon, 6 Cow. (N. Y.) 445; that the recognition of the contract may be contained in a letter, or in several letters, if so connected by "written links" as to form sufficient evidence of the contract; that the letters may be addressed to a third person, Browne, St. Frauds, § 346; Fyson v. Kitton, 30 E. L. & Eq. 374; Gibson v. Holland, L. R. 1 C. P. 1; that an agent may write his own name instead of that of his principal if intending to bind his principal by it, Williams v. Bacon, 2 Gray (Mass.) 387, 393, and citations there; that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum, Reuss v. Picksley, L. R. 1 Exc. 342; that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed, Dobell v. Hutchinson, 3 A. & E. 355; that the written contract may be rescinded by parol, although many decisions are opposed to this proposition, Richardson v. Cooper, 25 Me. 450; that equity will interfere to prevent a party making the statute an instrument of fraud, Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Hassam v. Barrett, 115 Mass. 256, 258; that a contract verbally made may be maintained for certain purposes, notwithstanding the statute; that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused, Chapman v. Rich, 63 Me. 588, and cases cited; that a respondent in equity waives the statute as a defense unless set up in plea or answer, Adams v. Patrick, 30 Vt. 516; that it must be specially pleaded in an action at law, Middlesex Co. v. Osgood, 4 Gray (Mass.) 447; Lawrence v. Chase, 54 Me. 196; that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it, Browne St. Frauds, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defense of the statute under the general issue. The different rule in Massachusetts and Maine, grew out of the practice act in the one state and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in Thornton v. Kempster, 5 Taunt. 786, 788, "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, Jervis, C. J., said, "the effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of McClellan v. McClellan, 65 Me. 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. Willes, J., perhaps correctly describes it in Gibson v. Holland, supra, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." Browne, St. Frauds, § 338. Benjamin's Sales, § 159. Fricker v. Thomlinson, 1 Man. & Gr. 772. Bradford v. Spyker, 32 Ala. 134. Bill v. Bament, 9 M. & W. 36. Philbrook v. Belknap, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

Appleton, C. J., and Walton, Danforth, Virgin and Libbey, JJ., concurred.

## SECTION 4.—ACCEPTANCE AND RECEIPT OF PART OF GOODS

### CHAPLIN v. ROGERS.

(Court of King's Bench, 1801. 1 East, 192.)

In an action for goods sold and delivered, the case proved was, that the parties being together in the plaintiff's farm yard, the defendant, after some objections and doubts upon the quality of a stack of hay (particularly the inside part) then standing in the yard, agreed to take it at 2s. 6d. per hundred weight. Soon after he sent a farmer to look at it, whose opinion was unfavourable. But about two months afterwards another farmer of the name of Loft agreed with the defendant for the purchase of some of this hay still standing untouched in the plaintiff's yard, and the defendant told Loft to go there and ask what condition it was in, saying he had only agreed for it if it were good. The plaintiff having informed Loft it was in a good state, he agreed to give the defendant 3s. 9d. per cwt. for it, the defendant having told him that he had agreed to give the plaintiff 3s. 6d. for it. Loft thereupon brought away thirty-six hundred weight; but this latter fact was without the knowledge, and against the direction of the defendant. There was a contrariety of evidence as to the quality of the hay when the stack was afterwards cut.

At the trial before Hotham, B., on the last Norfolk circuit, Sellon, Serjt., for the defendant, objected that the contract of sale was fraudulent and void by the statute of frauds, being for the sale of a commodity no part of which was delivered, and of which there was no acceptance by the defendant. But the learned Judge left it to the jury to decide whether the sale had been fraudulent, and whether under the circumstances there had been an acceptance by the defendant; and they found for the plaintiff on both points, and gave him £50. damages, being the value of the hay at the price agreed for. In the last term, a rule was obtained calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the grounds that the learned Judge had left that as a question of fact to the jury, which he himself ought to have decided as an objection in point of law arising on the statute of frauds; and because the evidence did not warrant the verdict.

Lord KENYON, C. J. It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it; for here the report states, that the question was specifically left to the jury whether or not there was an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it there must either be a part delivery of the thing, or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case, that the jury have not done rightly in finding the fact of a delivery. Where goods are ponderous, and incapable as here of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession: for he sold part of it to another person. Therefore, as upon the whole justice has been done, the verdict ought to stand.

The other Judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury.

Rule discharged.

## EDAN v. DUDFIELD.

(Court of Queen's Bench, 1841. 1 Q. B. 302.)

Debt for goods sold and delivered, and on an account stated.

Pleas: 1. As to all but £1. 9s. 2d., parcel, etc., nunquam indebitatus. Issue thereon.

2. As to the same, a set-off. Replication, denying the debt set-off. Issue thereon.

3. As to the £1. 9s. 2d., tender of the same, which the plaintiff took out of Court, and acknowledged satisfaction pro tanto.

On the trial, before Lord Denman, C. J., at the Middlesex sittings after Hilary term, 1839, it appeared that the defendant was employed by the plaintiff to clear goods for him at the custom house, and was accustomed to enter goods of the plaintiff, and did actually enter the goods now in question (German toys), then belonging to the plaintiff, in his own name. In the beginning of April, 1838, plaintiff was in defendant's debt to the amount of about £50.; and defendant proposed to plaintiff that the goods should be sold, and that defendant should retain his debt out of the proceeds; the plaintiff assented to this, and gave defendant a written authority to sell them. Afterwards, and before any sale, defendant, in conversation with an agent of plaintiff, said that he would keep the goods himself at the invoice price, less a discount of 15 per cent.: this was communicated to plaintiff. The goods were subsequently sold by defendant, about the end of April. Afterwards the defendant delivered an account current to the plaintiff, in which was an item, under date of April, 1838, "Two cases of toys, etc., sold for £120." The counsel for the defendant objected that there was no acceptance to satisfy section 17 of the Statute of Frauds; but the Lord Chief Justice held that there was a case for the jury, reserving leave to move for a nonsuit. Verdict for plaintiff.

Lord Denman, C. J., in this term (January 12th), delivered the judgment of the Court. After stating the ground of motion to be that there was no memorandum in writing, nor, as the defendant alleged, any acceptance, his Lordship proceeded as follows:

The facts were, that the defendant had acted as agent for the plaintiff on several occasions in relation to certain merchandises imported from France, and that the goods in question were lying at the custom house in the defendant's name, to be sold by him for the plaintiff. The plaintiff was considerably indebted to the defendant, who was pressing that a sale should be made, that he might pay himself out of the proceeds; and an authority to sell, dated 6th April, was given by the plaintiff to the defendant, and produced in the course of the plaintiff's evidence. But a witness stated that, at the end of the same month, he had called on the defendant on behalf of the plaintiff, and that, in that conversation, the defendant finally agreed to buy these goods himself, 15 per cent. under the cost price. The defendant subsequently sold the goods, and rendered a debtor and creditor account to the plaintiff, in which credit was given to the plaintiff for the goods, by an item in these words, "Goods" (describing them) "sold for £120." The action was brought, in effect, for that sum; and the verdict passed accordingly.

The plaintiff argued that this parol contract of sale was binding within the statute, because the defendant had accepted the goods, in selling them and keeping the money. This was denied; and it was said that the statute, requiring acceptance and actual receipt of the whole or part where there was no written memorandum, could not be satisfied in the case of one at the time of the bargain possessed of the goods, inasmuch as that circumstance prevents them from being delivered to him, or actually received by him, in virtue of the sale. At all events, it was contended that no act could be relied on to prove acceptance and receipt, but what was inconsistent with the purpose of the prior possession; whereas, in this case, all that was done, the sale and the account rendered, were perfectly consistent with the authority previously given, and the defendant's character of agent. We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance; and the effect of such acts, necessarily to be proved by parol evidence, must be submitted to the jury. We entertain this opinion after fully considering all the cases cited, especially Elmore v. Stone, 1 Taunt. 458; Nicholle v. Plume, 1 C. & P. 272; Maberley v. Sheppard, 10 Bing. 99. And see Dodsley v. Varley, 12 A. & E. 632, agreeing that such evidence must be unequivocal, but thinking the question, whether it is so or not under all the circumstances, fact for the jury, not matter of law for the Court.

It was indeed contended that parol evidence was inadmissible to explain the character of the acts relied on to prove acceptance; for that to admit it would let in all the inconvenience which the statute was intended to prevent. No case, however, warrants the holding the rule so strict: nor does convenience require it; for, where there is the foundation of an act done to build upon, the admission of declarations to explain that act lets in only that unavoidable degree of uncertainty to which all transactions to be proved by ordinary parol evidence are liable. Upon this principle, Stat. 9 Geo. IV, c. 14, § 1, on a very analogous matter, has been construed in the Court of Exchequer. For, whilst in Willis v. Newham, 3 Y. & J. 518, it was held that part payment, to take a case out of the Statute of Limitations, could not be proved by a verbal acknowledgment only, it was held in Waters v. Tompkins, 2 C., M. & R. 723, S. C., Tyrwh. & Gr. 137 that, where a sum had been paid without any statement on what account, declarations were admissible to explain on what account. Therefore a nonsuit cannot be entered.

The motion for a new trial, on the ground that the verdict was against the evidence, was supported by some very strong observations on the probabilities of the case, which were not however exclusively in favour of the defendant. It was moved for, also, on defendant's affidavit, which we have thought it right to examine carefully with those on the other side. The answer which these give is complete: no subsequent information has been or can be obtained; and the defendant's case is narrowed to the improbability that that of his adversary can be true. But this has been already considered by the jury, who were satisfied with the proof of it by a witness whose character stands unimpeached.

Rule discharged.[21]

## BILL v. BAMENT.

(Court of Exchequer, 1841. 9 Mees. & W. 36.)

Assumpsit for goods sold and delivered, and on an account stated. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the London sittings after Trinity term, the following facts appeared:

The defendant ordered of one Harvey, who was an agent of the plaintiff under a del credere commission, a quantity of goods, including twenty dozen hair-brushes and twelve dozen clothes-brushes, to be paid for on delivery, at a stipulated price; but no memorandum in writing of the bargain was made at the time. On receiving notice from Harvey that the brushes had arrived at his warehouse, the defendant, on the 22d of March last, went there, and directed a boy, whom he saw there, to alter the mark "No. 1," upon one of the packages, to "No. 12," and to send the whole of the goods to the St. Catharine's Docks. The next day, an invoice was delivered to the defendant, charging the brushes respectively at the rate of 8s. and 12s. each. The defendant objected to this price, alleging that by the contract, as he had understood it, the above were to be the prices of the brushes per dozen; and refused to pay for them. On the 24th of March, the plaintiff commenced the present action for the price. On the 27th, the defendant, at Harvey's request, wrote in Harvey's ledger, at the bottom of the page which contained the statement of the articles ordered by the defendant, and which page was headed "Bill & Co.," the following words: "Received the above, John Bament." The rest of the goods were sent to and received by the defendant. It was objected for the defendant, that there was no evidence of any contract in writing, or of any acceptance of the brushes, sufficient to satisfy the 17th section of the Statute of Frauds. The Lord Chief Baron reserved the point, and the plaintiff had a verdict for the amount claimed, leave being reserved to the defendant to move to enter a nonsuit.

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[21] In Dorsey v. Pike, 50 Hun (N. Y.) 534, 3 N. Y. Supp. 730 (1889) which was an action for the price of an engine, boiler, and pump, with appendages, alleged to have been sold by the plaintiff to the defendant, it appeared that the apparatus was in the possession of the defendant or her husband at the time of the agreement. Said the court: "Assuming that the machine was in the possession of the defendant at the time the agreement to purchase was made, and that the husband, as her agent, made it, those facts alone were not sufficient to give validity to the contract. To hold otherwise would have the effect to render the mere words of the parties to such a contract effectual, and the purpose of the statute would be defeated. The then possession was in no manner produced by or derived from such contract, but was lawfully taken and held under another and independent arrangement between the parties; and until the purchase was evidenced by some act of acceptance under or in pursuance of the agreement to buy, no valid sale would be accomplished. * * * The mere fact that the property was in possession of the defendant at the time of making the contract furnished no evidence of acceptance in its support." But see Bristol v. Mente, 79 App. Div. 67, 80 N. Y. Supp. 52 (1903), affirmed without opinion 178 N. Y. 599, 70 N. E. 1096 (1904).

PARKE, B. I concur in thinking that there was no evidence to go to the jury to satisfy the Statute of Frauds. With regard to the point which has been made by Mr. Martin, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point, but I am clearly of opinion that it is untenable. There must, in order to sustain the action, be a good contract in existence at the time of action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned. I think, therefore, that a written memorandum, or part payment, after action brought, is not sufficient to satisfy the statute. Then, to take the case out of the 17th section, there must be both delivery and acceptance; and the question is, whether they have been proved in the present case. I think they have not. I agree that there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury quo animo the defendant took possession of them: so also, the receipt was some evidence of an acceptance. But there must also be a delivery; and to constitute that, the possession must have been parted with by the owner, so as to deprive him of the right of lien. Harvey might have agreed to hold the goods as the warehouseman of the defendant, so as to deprive himself of the right to refuse to deliver them without payment of the price; but of that there was no proof. There was no evidence of actual marking of the goods, or that the order to mark was assented to by Harvey. I am of opinion, therefore, that there was no sufficient proof of acceptance to satisfy the statute, and that the case falls within the 17th section.

Rule absolute accordingly.[22]

## FARINA v. HOME.

(Court of Exchequer, 1846. 16 Mees. & W. 119.)

Debt for goods sold and delivered, and on an account stated. Plea, nunquam indebitatus.

At the trial, before the under-sheriff of Middlesex, it appeared that the action was brought by the plaintiff, the well-known manufacturer of Eau de Cologne, residing at the city of Cologne, to recover from the defendant, a dealer in Eau de Cologne in London, the sum of £15., price of 25 dozen of Eau de Cologne, which, in July, 1845, the defendant had verbally ordered from the plaintiff. It was accordingly sent by the plaintiff from abroad to a shipping agent of the plaintiff in London, named Brenchley, who received it, and warehoused it with one Barber, a wharfinger, at the same time informing the defendant of its arrival. On receipt of the goods, Barber handed to Brenchley a delivery warrant, dated 21st July, whereby they were made deliverable to Brenchley or his assignee by endorsement, on payment of rent and charges from the 25th of July. Brenchley forthwith endorsed and sent it to the defendant. The defendant kept the warrant for about ten months, and although repeatedly applied to, to pay the price of and charges on the goods, he did not do so; and he refused also to give back the warrant, saying that he had sent it to his solicitor, and that he intended to defend the action, for he had never ordered the goods; and adding, that they would remain for the present in bond.

Upon these facts, it was contended for the defendant, that there was no evidence of the delivery and acceptance of the goods, sufficient to satisfy the Statute of Frauds. The under-sheriff left the question to the jury, whether the defendant had accepted and received the goods; stating that, to bring the case within the statute, it must be an acceptance with the intention of taking possession as owner. The jury found a verdict for plaintiff, damages £16. 11s.

In Easter Term, Prentice obtained a rule nisi for a new trial, on the ground of misdirection.

Parke, B. In this case, which was argued before us, in the absence of the Lord Chief Baron, a few days ago, the only point we wished to consider was, whether there was sufficient evidence of the acceptance and actual receipt of the goods to satisfy the 17th section of the Statute of Frauds. The evidence as to this part of the case was, that, after the defendant had verbally ordered a quantity of Eau de Cologne, and at the price of more than £10., from the plaintiff's agent in London, (the plaintiff residing at Cologne,) a case containing the quantity ordered was received by the agent, and warehoused by him with a wharfinger and warehousekeeper, who gave for it a document, dated the 21st of July, which is called a warrant, by which the case was made deliverable to the agent or his assignee, by endorsement, on payment of rent and charges from the 25th of July, and the agent endorsed it to the defendant, and sent it to him. This warrant the defendant kept for some months. He was repeatedly applied to for the charges upon and price of the Eau de Cologne, which he did not pay; nor did he return the warrant when asked for it, but said he had sent it to his solicitor, and meant to defend the action, as he had never ordered the goods; and he further said, the goods would remain at present in bond.

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[22] A concurring opinion was delivered by Lord Abinger, C. B.

It was contended, on the trial before the under-sheriff, that there was no such evidence of the acceptance and receipt of the goods as to bind the bargain. The under-sheriff left the question of receipt and acceptance to the jury, stating, and correctly stating, that, to bring the case within the statute, the acceptance must be with the intention of taking possession as owner. The jury found a verdict for the plaintiff. The under-sheriff ordered the writ of trial to be retained, in order to allow time for an application to the Court. On a motion for a new trial, we intimated our opinion that there was evidence to go to the jury of the defendant's acceptance of the goods by retaining the delivery warrant; but Mr. Prentice insisted that there was no sufficient evidence of the actual receipt of the goods, that is, the delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee; and that the delivery and receipt of the warrant was not in effect the same thing as the delivery and receipt of the goods; and we are all of that opinion. This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor, (who is the vendor's agent,) and his possession is that of the consignee, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the mean time, the warrant, and the endorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee. The case is in principle the same as that of Bentall v. Burn, and others, which are stated and well discussed in a recent able work of Mr. Blackburn, "On the Contract of Sale," pp. 27, 41, 297; and in Mr. C. Addison's work, p. 70. We all therefore think, that though there was sufficient evidence of the acceptance, if the goods had been delivered to the defendant, there is none of the receipt; and therefore there must be a new trial.

Rule absolute.

## MORTON v. TIBBETT.

(Court of Queen's Bench, 1850. 15 Q. B. 428.)

Debt for goods sold and delivered, and goods bargained and sold. Plea, nunquam indebitatus. Issue thereon.

On the trial before Pollock, C. B., at the Cambridgeshire spring assizes, 1849, it appeared that the action was brought to recover the price of fifty quarters of wheat. On 25th August, 1848, the plaintiff and defendant being at March market, sold the wheat to the defendant by sample. The defendant said that he would send one Edgley, a general carrier and lighterman, on the following morning to receive the residue of the wheat in a lighter for the purpose of conveying it by water from March, where it then was, to Wisbeach; and the defendant himself took the sample away with him. On 26th August Edgley received the wheat accordingly. On the same day the defendant sold the wheat at a profit, by the same sample, to one Hampson at Wisbeach market. The wheat arrived at Wisbeach in due course on the evening of Monday the 28th August, and was tendered by Edgley to Hampson on the following morning, when he refused to take it, on the ground that it did not correspond with the sample. Up to this time the defendant had not seen the wheat; nor had any one examined it on his behalf. Notice of Hampson's repudiation of his contract was given to the defendant; and the defendant on Wednesday the 30th August sent a letter to the plaintiff repudiating his contract with the plaintiff on the same ground.

There was no memorandum in writing of the bargain within § 17 of the statute of frauds, 29 Car. II, c. 3; and it was objected for the defendant that there was no evidence of acceptance and receipt to satisfy the requirements of the same section. The lord chief baron overruled the objection; and the counsel for the defendant addressed the jury exclusively on the question of such acceptance and receipt. A verdict was found for the plaintiff, and leave given to move to enter a nonsuit, if the court should think either that there was no evidence of acceptance and receipt or no such evidence as justified the verdict.

Worlledge in Easter term, 1849, obtained a rule nisi accordingly.

Campbell, C. J. In this case the question submitted to us is, whether there was any evidence on which the jury could be justified in finding that the buyer accepted the goods and actually received the same, so as to render him liable as buyer, although he did not give any thing in earnest to bind the bargain or in part payment, and there was no note or memorandum in writing of the bargain.

It would be very difficult to reconcile the cases on this subject; and the difference between them may be accounted for by the exact words of the 17th section of the statute of frauds not having been always had in recollection. Judges as well as counsel have supposed that, to dispense with a written memorandum of the bargain, there must first have been a receipt of the goods by the buyer, and after that an actual acceptance of the same. Hence perhaps has arisen the notion that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor. But the words of the act of parliament are: "No contract for the sale of any goods, wares and merchandizes, for the price of £10. sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It is remarkable that, notwithstanding the importance of having a written memorandum of the bargain, the legislature appears to have been willing that this might be dispensed with where by mutual consent there has been part performance. Hence the payment of any sum in earnest to bind the bargain or in part payment is sufficient. This act on the part of the buyer, if acceded to on the part of the vendor, is sufficient. The same effect is given to the corresponding act by the vendor of delivering part of the goods sold to the buyer, if the buyer shall accept such part and actually receive the same. As part payment however minute the sum may be is sufficient, so part delivery however minute the portion may be is sufficient. This shews conclusively that the condition imposed was not the complete fulfilment of the contract to the satisfaction of the buyer. In truth the effect of fulfilling the condition is merely to waive written evidence of the contract and to allow the contract to be established by parol as before the statute of frauds passed. The question may then arise, whether it has been performed either on the one side or the other. The acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined.

As the act of parliament expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer to object at all events to the quantity and quality of the residue, and even where there is a sale by sample that the residue offered does not correspond with the sample. We are therefore of opinion that, whether or not a delivery of the goods sold to a carrier or any agent of the buyer is sufficient, still there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods or done any thing to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.

We are therefore of opinion in this case that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to Edgley was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it.

We will now examine the cases which are supposed to prove the doctrine that there can be no acceptance within the meaning of the statute of frauds unless the buyer is precluded from objecting that the vendor has not fully performed the contract on his part.

The first of these was Howe v. Palmer, 3 B. & Ald. 321, which we clearly think was well decided, although we cannot concur in all the reasons given for the decision. There the only evidence of acceptance and receipt was that the agent of the vendor who had verbally sold to the defendant twelve bushels of tares, part of a larger quantity in the vendor's possession, had measured off twelve bushels of the tares, and set them apart for the purchaser. According to the contract they were to remain in the possession of the vendor till called for. The purchaser therefore neither had accepted nor received the goods. Abbott, C. J., does say: "If he had once accepted he could not afterwards make any objection, even if it turned out that the tares did not correspond with the sample." But this observation was quite unnecessary for the determination of the case; and, with the most sincere respect to the great judge from whom it fell, we do not think that it is applicable. The proper ratio decidendi seems to us to be given by Holroyd, J., where he says: "In this case there has been no actual receipt of any part of the goods sold within the usual meaning of the term, and I think that what has been done ought not to be considered in point of law as an acceptance. For supposing that it was made part of the contract in this case that the seller should set apart and measure the thing sold, that would not make the act of measuring amount to a virtual acceptance or receipt of the goods by the buyer."

The next case relied upon is Tempest v. Fitzgerald, 3 B. & Ald. 680, where in an action for the price of a horse that had died after the time when he was sold by parol and before he was delivered or paid for, the question arose upon whom the loss should fall. The only evidence of acceptance and receipt was that, while the horse remained in the possession of the vendor, the purchaser made his servant gallop the horse and gave some directions about his treatment, requesting that he might be kept by the vendor a week longer. The court held that there had been no acceptance and receipt of the horse by the purchaser. But the case has little connection with the doctrine contended for, that there must be an opportunity for the vendor to inspect the quality of the thing sold; and Abbott, C. J., founds his judgment upon this consideration, that the defendant had no right of property in the horse till the price was paid, and could not till then exercise any act of ownership over him. Holroyd, J., says: "There is no evidence to shew that" the vendor "had ever parted with the possession" of the horse.

Next comes Hanson v. Armitage, 5 B. & Ald. 557. There the vendor, who resided in London, having been in the habit of selling goods to a customer in the country and of delivering them to a wharfinger to be forwarded by the first ship, in pursuance of a verbal order from the customer delivered a parcel of goods to the wharfinger to be forwarded in the usual manner. The customer had done nothing beyond giving the verbal order for the goods. Abbott, C. J., in a very few words delivered the judgment of the court that an action could not be maintained for the price of the goods, on the ground that the acceptance in this case not being by the party himself, was not sufficient, referring to Howe v. Palmer, 3 B. & Ald. 321, where he says: "It was held that there could be no actual acceptance so long as the buyer continued to have a right to object either to the quantum or quality of the goods." But the decision may well stand on other grounds; and we may observe that it is an actual receipt of the goods which the statute requires, and not an actual acceptance.

Carter v. Toussaint, 5 B. & Ald. 855, was likewise relied upon, but it was merely (like Tempest v. Fitzgerald, 3 B. & Ald. 680) a case of a sale by parol of a horse that remained always in the possession and under the control of the vendor, so that he could not have been accepted and received by the purchaser. Abbott, C. J., says: "The plaintiff's character of owner remained unchanged from first to last."

The next case is Smith v. Surman, 9 B. & C. 561, and there after a sale of timber by parol the purchaser had offered to sell the butts, and had given some directions about crosscutting the timber; but the evidence clearly proved that the whole continued to remain in the possession of the vendor. The court, as might have been expected, held that there could be no receipt by the purchaser while the possession of the goods remained with the vendor. A very learned judge, my Brother Parke, does unnecessarily add (9 B. & C. 577): "That the later cases have established that, unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance." That there can be no acceptance and receipt by the purchaser while the lien of the vendor remains is clear enough, for the vendor's lien necessarily supposes that he retains the possession of the goods; but I must be permitted to doubt whether the cases referred to have established the residue of the rule.

The last case cited on behalf of the defendant was Norman v. Phillips, 14 M. & W. 277. This case very much resembled Hanson v. Armitage, 5 B. & Ald. 557, and presented no stronger evidence of acceptance and receipt. The defendant living at Wallingford gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the Great Western Railway so that it might be forwarded to him at Wallingford. The timber was accordingly forwarded to the Wallingford station; but the defendant being informed of its arrival refused to have any thing to do with it. The court held that although there might be a scintilla of evidence for the jury of an acceptance of the timber within the statute of frauds, yet there was not sufficient to warrant them in finding that there was such an acceptance; and the court set aside a verdict for the plaintiff as not warranted by the evidence. Alderson, B., says: "The true rule appears to me to be that acceptance and delivery under the statute of frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods." He adds what, with great deference, is a better reason: "The carrier is only an agent for the purpose of carrying, and here the purchaser himself immediately refused to take the goods." It was upon this reason that the rest of the court appears to have proceeded.

If there were such a rule as is contended for it would be decisive against the plaintiff in this case, for the defendant never had an opportunity of examining the goods sold: there is no evidence that Edgley was his agent for that purpose; and he had done nothing to preclude him from objecting to the quality of the wheat. But if there be no such rule, then surely there was evidence to submit to the jury and to justify them in finding an acceptance and receipt. He specially sent Edgley to receive the wheat after the delivery of the wheat to his agent and when it was no longer in the possession of the vendor, instead of rejecting it as in other cases, he exercised an act of ownership over it by re-selling it at a profit, and altering its destination by sending it to another wharf, there to be delivered to his vendee. The wheat was then constructively in his own possession; and could such a re-sale and order take place without his having accepted and received the commodity? Does it lie in his mouth to say that he has not accepted that which he has re-sold and sent on to be delivered to another? At any rate is not this evidence from which such an acceptance and receipt may be inferred by the jury? Upon similar evidence the finding of an acceptance and receipt has been sanctioned by very eminent judges.

In Hart v. Sattley, 3 Campb. 528, where goods had been verbally ordered to be sent from London to Dartmouth, and were sent by a carrier employed by the defendant, and were not proved to have been rejected by him, although there was no proof that they had come to his hands, Chambre, J., is reported to have said: "I think under the circumstances of this case the defendant must be considered as having constituted the master of the ship his agent to accept and receive the goods." The plaintiff recovered a verdict which was not disturbed.

In Chaplin v. Rogers, 1 East, 192, where a stack of hay being sold by parol to the defendant he, without paying for it or removing it, re-sold a part of it to another person who took it away, and the jury found that the defendant had accepted and received the stack of hay, Lord Kenyon said: "The question was specifically left to the jury whether or not there was an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law." "Here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person." "The other judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury." And the verdict for the plaintiff was confirmed.

So in Blenkinsop v. Clayton, 7 Taunt. 597, Gibbs, C. J., and the whole Court of Common Pleas, agreed that if a person who has contracted for the purchase of goods offers to re-sell them as his own, whether this be proof of an acceptance and receipt of the goods by himself is a question for the jury.

I will only further mention the well-considered case of Bushel v. Wheeler, 8 Jurist, 532, 15 Q. B. 442, note, decided in this Court. The defendant residing in Herefordshire had verbally ordered goods from a manufacturer at Bristol; according to his orders they were sent to Hereford and deposited in a warehouse there. After they had been a considerable time there the defendant repudiated them. In an action for the price before a most learned and cautious judge, Mr. Justice Erskine, it was left to the jury whether upon the evidence the buyer had accepted and received the goods; and the verdict was for the defendant, with liberty to enter a verdict for the plaintiff if the court should be of opinion that there was an acceptance. A rule to shew cause was granted; and cause being shewn the court unanimously approved of the direction, but declined to take upon themselves to enter a verdict for the plaintiff, and made a rule absolute for a new trial. I particularly rely upon the pointed language in that case of my Brother Coleridge, who, after observing that the acceptance required by the statute must be very clear and unequivocal, says that it may be constructive; and adds that "it is a question for the jury, whether under all the circumstances" "the acts which the buyer does or forbears to do are an acceptance or otherwise."

These are express decisions through a long course of years that there may be an acceptance and receipt of goods by a purchaser within the statute of frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. We approve of these decisions thinking that they do not infringe upon the statute of frauds and that they conduce to fair dealing in trade.

We are therefore of opinion that in this case the rule for entering a nonsuit should be discharged.

Rule discharged.

## GARDNER v. GROUT.

(Court of Common Pleas, 1857. 2 C. B. [N. S.] 340.)

This was an action for the breach of a contract to deliver 24½ tons of sacks and bags, which the defendant had agreed to sell to the plaintiff at the price of £11. per ton.

At the trial before Williams, J., at the first sitting in London in the present term, a contract by word of mouth was proved in the terms alleged in the declaration; but there was no contract in writing, nor any part payment. The plaintiff, however, relied, for the purpose of taking the case out of the Statute of Frauds, upon a part delivery and acceptance, as to which the evidence was as follows: Four days after the sale, the plaintiff went to the defendant's warehouse, and asked for samples of the sacks and bags, which were given to him by the defendant's foreman, and which he promised to pay for when the bulk (which was all there at the time) was taken away. The samples so given to the plaintiff were by the defendant's order weighed and entered.

On the part of the defendant, it was submitted that the taking the samples was not such a part acceptance of the thing sold as would satisfy the 17th section of the statute.

For the plaintiff, the case of Hinde v. Whitehouse, 7 East, 558, was relied upon. There, sugars, which were in the King's warehouse, under the locks of the King and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th of September, when samples of ½lb. weight from each hogshead, drawn after the sugars had been weighed and the duties ascertained at the King's beam, were produced to the bidders assembled; and the auctioneer,—having then before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weight of the sugars, and also another written paper containing the conditions of sale, which latter he read to the bidders as the conditions on which the sugars mentioned in the catalogue were to be sold, but the two papers were not externally annexed, nor did they contain any internal reference to each other,—wrote down on the catalogue the name of the highest bidder, and the sum bid for the particular lots; having first informed the bidders that the duties had not then been paid, but would be paid on the morrow by the seller: and, after the biddings closed, the samples were delivered to and accepted by the purchaser, according to the usual practice at such sales, as part of his purchase, to make up the quantity marked as weighed at the King's beam: and a fire having consumed the sugars on the 22d of September, before the duties could be paid, and without the default of the seller,—it was held, first, that, at common law, there was a sale to change the property at the time and place of auction though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties; and, consequently, that the loss must fall upon the buyer,—secondly, that, assuming a sale of goods by auction to be within the 17th section of the Statute of Frauds, 29 Car. II, c. 3, and therefore requiring to be evidenced by a memorandum in writing of the bargain, signed by the party to be charged, or his authorized agent, except where the buyer shall receive part of the goods sold: yet here the delivery to and acceptance of the samples by the buyer, which delivery was made as part of the thing purchased, and upon which the duties were paid, at any rate took the case out of the statute.

The learned judge left it to the jury to say whether the samples of the sacks and bags were delivered and accepted as part of the bulk. The jury found that they were, and accordingly a verdict was taken for the plaintiff (damages £40.), leave being reserved to the defendant to move to enter the verdict the other way, or a nonsuit, if the court should be of opinion that there was no acceptance of part, to take the case out of the statute.

Cockburn, C. J. That is a very different case from the present. There, the buyer never saw the bulk: the things handed to him really were mere samples. But here the plaintiff receives part of the very things which he has already bought. I think there should be no rule.

The rest of the court concurring.

Rule refused.

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## CURRIE et al. v. ANDERSON.

(Court of Exchequer Chamber, 1860. 2 El. & El. 592.)

Declaration for goods sold and delivered. Plea. Never indebted Issue thereon.

At the trial, before Watson, B., at the Liverpool Summer Assizes, 1859, the facts appeared to be as follows. The plaintiffs were merchants and ship chandlers at Liverpool, carrying on business under the firm of Currie, Newton & Co., and the defendant was a shipowner at Aberdeen. On 27th September, 1855, the defendant called at the plaintiffs' office and saw Mr. Newton, one of the plaintiffs, and verbally ordered of him some stores, to the amount of £62. 10s., for The Phœnix, a ship of the defendant then in the Black Sea, to be sent out from Liverpool, by one of McIver's steamers, to Constantinople. The defendant directed Newton to enter the stores out at the Custom-House. Before he ordered the stores, he had asked Newton whether the plaintiffs had ever sent any goods out to Constantinople, and whether they had any agent there? Newton answered that they had no agent there, but had once consigned some goods there to Messrs. Hanson & Co. Newton, having selected the goods according to the defendant's order, namely, 5 tierces of beef, 4 barrels of pork, 2 barrels of flour, 1 barrel of peas, and 1 keg of barley, entered them out at the Custom-House, and sent them down to McIver's steamer Melita in a cart, together with two other barrels of flour, which the defendant, having purchased of some other person, had in the meantime sent to the plaintiffs' warehouse, to be sent to the ship together with the goods which he had ordered of the plaintiffs.

Newton afterwards asked the defendant how the bills of lading were to be made out; and the defendant said, "Make them out in the name of the same parties you sent your goods to," and added, "You had better make them out in your own name, for they won't know me, but will know you." Accordingly, the plaintiffs made out the bill of lading thus: "Shipped by Currie, Newton & Co." (here followed an enumeration of the goods, which corresponded with the order in all respects, except that the number of barrels of flour enumerated was four, the two sent by the defendant to the plaintiffs' warehouse, as above mentioned, being included). "To be delivered at the port of Constantinople unto Messrs. C. Hanson & Co. or their assigns."

The plaintiffs handed the bill of lading to the agent of the steamer, and at the same time (13th October, 1855) paid freight for the whole and received back the bill of lading signed. On 16th October, the defendant called on the plaintiffs and repaid the freight, and Newton handed him the bill of lading. The defendant enclosed the bill of lading in a letter addressed to the captain of the Phœnix, to the care of Messrs. Hanson & Co., Constantinople; and wrote another letter to the captain, advising him of this. The captain, being absent on the French transport service in the Black Sea, did not receive these letters for some time, but on doing so, in the middle of March, 1856, went to Constantinople and obtained the bill of lading from Messrs. Hanson & Co. The goods, however, were not forthcoming. It did not appear whether or not The Melita ever arrived at Constantinople. The captain of the Phœnix returned the bill of lading to the defendant, who, on 5th November, 1856, forwarded it from Aberdeen to the plaintiffs in a letter, in which he said "I enclose the bill of lading for stores sent out to the barque Phœnix. Please see after them. I think that the master of the steamer must account for them." The plaintiffs immediately returned the bill of lading, saying that they could not interfere in the matter. And, after a long correspondence, they brought this action to recover the price of the stores so supplied by them.

The jury returned a verdict for the plaintiffs for the amount claimed, £62. 10s.; and the learned Judge reserved leave to the defendant to move to enter the verdict for him if the Court should be of opinion that there was no evidence of an acceptance and receipt by the defendant of the goods, to satisfy the Statute of Frauds.

WIGHTMAN, J. I am of opinion that there was evidence in this case that the defendant so dealt with the goods and with the bill of lading as to justify the jury in finding that there was an acceptance and actual receipt by him of the goods, within the meaning of the 17th section of the Statute of Frauds. The facts seem to bring the case very much within the principle thrown out by some of the Judges in Meredith v. Meigh, 2 E. & B. 364 (E. C. L. R. vol. 75), in which I entirely concur. Erle, J., there says: "I have no doubt that the bill of lading, which is the symbol of property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself." And Crompton, J.: "When goods, or the indicia of the property in goods, remain long under the control of the vendee, especially when the vendee has in any respect acted as the owner of the goods, there may be sufficient evidence of an acceptance and receipt, although the goods themselves are not received."

In the present case the defendant purchases goods of the plaintiffs, and, hearing from them that they had before consigned goods to Messrs. Hanson & Co., at Constantinople, desires the plaintiffs to make out the bill of lading to that firm. The defendant also sent goods of his own to the plaintiffs' warehouse, which were, by his direction, sent down to the same ship with the goods purchased by him of the plaintiffs. All the goods were put on board together, and in the bill of lading those other goods of the defendant were included with the goods the subject of the present action. The plaintiffs paid the freight in the first instance, and the defendant repaid them and thereupon received from them the bill of lading. This was in October, 1855, and, after keeping and dealing with the bill of lading for more than a year, the defendant returned it, in November, 1856, to the plaintiffs with this letter: "I enclose the bill of lading for stores sent out to the barque Phœnix. Please see after them. I think that the master of the steamer must account for them." This letter seems to me most material as evidence to shew that the defendant has acted as owner of the goods, not only by keeping the bill of lading so long, but by expressly desiring the plaintiffs to see after the goods. Drawing the ordinary inference from all these facts, I think that there was abundant evidence that the defendant had so dealt with the goods as to have accepted and actually received them, within the dicta in Meredith v. Meigh, 2 E. & B. 364 (E. C. L. R. vol. 75), which are clearly good law.

Rule discharged.[23]

## CUSACK et al. v. ROBINSON.

(Court of Queen's Bench, 1861. 1 Best & S. 299.)

Declaration for goods sold and delivered, and goods bargained and sold. Plea, never indebted.

At the trial, before Blackburn, J., at the Liverpool Winter Assizes in 1860, it appeared that the defendant, who was a London merchant, on the 24th October, 1860, at Liverpool, called on the plaintiffs, who are importers of Canadian produce, and said he wanted to buy from 150 to 200 firkins of Canadian butter. He then went with one of the plaintiffs to their cellar, where he was shewn a lot of 156 firkins of butter, "Ex Bohemian," belonging to the plaintiffs, which he then had the opportunity of inspecting, and in fact he did open and inspect six of the firkins in that lot. After that examination, they went to another cellar to see other butter, which however did not suit the defendant. At a later period of the same day, the plaintiffs and the defendant made a verbal agreement, by which the defendant agreed to buy that specific lot of 156 firkins, at 77s. per cwt. When the price had been agreed on, the defendant took a card on which his name and address in London were written "Edmund Robinson, 1, Wellington Street, London Bridge, London," and wrote on it "156 firkins butter to be delivered at Fenning's Wharf, Tooley Street." He gave this to the plaintiffs and at the same time said that his agents, Messrs. Clibborn, at Liverpool, would give directions how the goods were to be forwarded to Fenning's Wharf. The plaintiffs, by Clibborn's directions, delivered the butter to Pickford's carts to be forwarded to the defendant at Fenning's Wharf. The plaintiffs sent an invoice, dated the 25th October, 1860, to the address on the defendant's card. They received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that on the defendant's return he would no doubt attend to it. There was no evidence that the writer of this letter had any authority to sign a memorandum of a contract. On the 27th October, the plaintiffs, in Liverpool, received a telegram from the defendant in London, in effect asserting that the butters had been sold by the plaintiffs subject to a warranty, that was equal to a sample, but that they were not equal to sample, and therefore would be returned. The plaintiffs replied by telegram that there was no such warranty, and they must be kept.

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[23] Concurring opinions were delivered by Crompton and Hill, JJ.

A clerk at Fenning's Wharf proved that Messrs. Fennings stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th October, Pickford & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue on the morning of the 27th October. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by Fenning to Pickford & Co., under a delivery order from the defendant dated 27th October. The defendant's counsel admitted that it must be taken that the sale was not subject to any warranty; but objected that the price of the goods exceeded £10., and that there was nothing proved to satisfy the requisitions of the Statute of Frauds.

The verdict was entered for the plaintiffs for £420. 10s. 1d., with leave to the defendant to move to enter a nonsuit, if there was no evidence proper to be left to the jury either of a memorandum of the contract or of an acceptance and actual receipt of the goods.

In Hilary Term, 1861, Edward James obtained a rule nisi accordingly, citing Nicholson v. Bower, 1 E. & E. 172, which rule was argued at the Sittings in banc after Easter Term, on the 9th May, before Hill and Blackburn, Js.

Mellish and Quain shewed cause. It must be conceded, on the part of the plaintiffs, that there was no memorandum of a contract in writing to satisfy the 17th section of the Statute of Frauds, 29 Car. II, c. 3, which enacts, "No contract for the sale of any goods, wares, and merchandises for the price of £10. sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The card which the defendant delivered to the plaintiffs is insufficient for that purpose, as it does not contain the names of both parties to the contract, neither does it state the price at which the butter was to be sold.

But there is evidence of an acceptance and actual receipt of the goods within the meaning of the statute. A very important fact in the case is, that the sale was a sale of a specific lot of 156 firkins of butter, and also that there was a verbal contract for the sale of the butter which was valid at common law, and the vendee gave directions that it should be sent to him at Fenning's Wharf. As the defendant was in the habit of using Fenning's Wharf as his warehouse, his ordering certain specific goods to be taken there, and they being taken there by his direction, and warehoused in the manner goods received on his account were usually warehoused, vested the goods in his actual possession. If the goods are in the vendee's actual possession, then the vendor's right of lien for the price is destroyed. Suppose instead of directing the goods to Fenning's Wharf, the defendant had directed them to his own warehouse, surely that would have been ample evidence of an acceptance and actual receipt to satisfy the statute.

There is a distinction between the cases of a purchase of specific goods, and of goods which are in bulk and not ascertained. Suppose a man goes into a shop and says, "I buy that chattel; send it to such a place, or give it to a porter," and afterwards receives it and exercises an act of dominion over it, he has done everything the statute requires to constitute an acceptance and receipt. At one time it was doubted whether, in order to satisfy this clause in the statute, the acceptance might not follow the delivery, but that doubt has been removed by Morton v. Tibbett, 15 Q. B. 428 (E. C. L. R. vol. 69), where this Court decided that the acceptance must precede or be contemporaneous with the delivery. That case is also an authority to show that the fact of the vendee having dealt with the goods as owner, is evidence of an acceptance and receipt. Here, after a contract respecting these goods, which was binding at common law, had been entered into, the defendant exercised an act of dominion over them by ordering them to be sent to Fenning's Wharf, and to be warehoused there for him.

In Elmore v. Stone, 1 Taunt. 458, the defendant purchased two horses under a verbal agreement from the plaintiff, and desired the plaintiff, who was a livery-stable keeper, to keep the horses at livery for him, which the plaintiff agreed to do. The Court of Common Pleas held that there was sufficient evidence of a delivery within the statute. Chaplin v. Rogers, 1 East, 192, decided that where a vendee, after a bargain and sale by parol, deals with goods as if they were in his actual possession, such an act of ownership is evidence of a receipt and acceptance by the vendee. In Hart v. Bush, E., B. & E. 494 (E. C. L. R. vol. 96), this Court held that a delivery of goods by the vendor to a wharfinger appointed by the vendee, to be forwarded by any vessel to the vendee, would not constitute an acceptance and receipt under the statute; but that case is distinguishable for two reasons, first that the sale was not one of specific goods, and next the direction given by the vendee to the vendor was, that the goods were to be sent to him by sea from a place called Griffin's Wharf, London. The facts were that they were forwarded from Griffin's Wharf in a ship selected by the wharfinger, and lost before they reached their destination.

Nicholson v. Bower, E. & E. 172, which was cited when the rule was moved, will probably be relied on by the other side; but in that case the vendee purposely suspended the acceptance because he was in insolvent circumstances. Meredith v. Meigh, 2 E. & B. 364 (E. C. L. R. vol. 75), may perhaps also be relied on; but there the goods sold were not specific goods; the delivery of them on board a ship selected by the vendor, therefore, could in no way amount to an acceptance and receipt by the vendee.

Blackburn, J. (After fully stating the facts his lordship proceeded). It was not contended that there was any sufficient memorandum in writing in the present case: but it was contended that there was sufficient evidence that the defendant had accepted the goods sold, and actually received the same; and, on consideration, we are of that opinion.

The words of the statute are express, that there must be an acceptance of the goods, or part of them, as well as an actual receipt: and the authorities are very numerous to shew that both these requisites must exist or else the statute is not satisfied. In the recent case of Nicholson v. Bower, 1 E. & E. 172, which was cited for the defendant, 141 quarters of wheat were sent by a railway, addressed to the vendees. They arrived at their destination, and were there warehoused by the Railway Company under circumstances that might have been held to put an end to the unpaid vendor's rights. But the contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat: on the contrary, it was shewn to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees, knowing that they were in embarrassed circumstances, purposely abstained from accepting the goods, and each of the Judges mentions that fact as the ground of their decision. In Meredith v. Meigh, 2 E. & B. 364 (E. C. L. R. vol. 75), the goods, which were not specified in the original contract, had been selected by the vendor, and put on board ship by the directions of the vendee, so that they were in the hands of a carrier to convey them from the vendor to the vendee. It was there held, in conformity with Hanson v. Armitage, 5 B. & Ald. 557 (E. C. L. R. vol. 7), that the carrier, though named by the vendee, had no authority to accept the goods. And in this we quite agree: for though the selection of the goods by the vendor, and putting them in transit, would, but for the statute, have been a sufficient delivery to vest the property in the vendee; it could not be said that the selection by the vendor, or the receipt by the carrier, was an acceptance of those particular goods by the vendee.

In Baldey v. Parker, 2 B. & C. 37 (E. C. L. R. vol. 9), which was much relied on by Mr. Milward in arguing in support of this rule, the ground of the decision was that pointed out by Holroyd, J., who says, p. 44: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute." The principle here laid down is that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller, as unpaid vendor, so as to preserve his lien; and it has been repeatedly recognized. But though the goods remain in the personal possession of the vendor, yet, if it is agreed between the vendor and the vendee that the possession shall thenceforth be kept, not as a vendor but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute: Marvin v. Wallis, 6 E. & B. 726 (E. C. L. R. vol. 88), Beaumont v. Brengeri, 5 C. B. 301 (E. C. L. R. vol. 57). In both of these cases the specific chattel sold was ascertained, and there appear to have been acts indicating acceptance subsequent to the agreement which changed the nature of the possession.

In the present case there was ample evidence that the goods, when placed in Fenning's Wharf, were put under the control of the defendant to await his further directions, so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited. There was also sufficient evidence that the defendant had, at Liverpool, selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. This was certainly evidence of an acceptance, and the only remaining question is, whether it is necessary that the acceptance should follow, or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. In Saunders v. Topp, 4 Exch. 390, which is the case in which the facts approach nearest to the present case, the defendant had, according to the finding of the jury, agreed to buy from the plaintiff 45 couple of sheep which the defendant, the purchaser, had himself selected, and the plaintiff had by his directions put them in the defendant's field. Had the case stopped there, it would have been identical with the present. But there was, in addition, some evidence that the defendant, after seeing them in the field, counted them, and said it was all right, and, as this was some evidence of an acceptance after the receipt, it became unnecessary to decide whether the acceptance under the statute must follow the delivery. Parke, B., from the report of his observations during the argument, seems to have attached much importance to the selection of particular sheep by the defendant, but in his judgment, he abstains from deciding on that ground, though certainly not expressing any opinion that the acceptance must be subsequent to the delivery. The other three Barons—Alderson, Rolfe, and Platt—express an inclination of opinion that it is necessary, under the statute, that the acceptance should be subsequent to or contemporaneous with the receipt; but they expressly abstain from deciding on that ground.

In the elaborate judgment of Lord Campbell in Morton v. Tibbett, 15 Q. B. 428 (E. C. L. R. vol. 69), in which the nature of an acceptance and actual receipt sufficient to satisfy the statute, is fully expounded; he says (p. 434), "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." The intention of the legislature seems to have been that the contract should not be good unless partially executed, and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor, by the vendee's directions, parts with the possession, and puts them under the control of the vendee so as to put a complete end to all the rights of the unpaid vendor as such. We think, therefore, that there is nothing in the nature of the enactment to imply an intention, which the legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute, and we do not think we ought so to construe it.

We are, therefore, of opinion that there was evidence in this case to satisfy the statute, and that the rule must be discharged.

Rule discharged.

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## PAGE v. MORGAN.

(Queen's Bench Division, Court of Appeal, 1885. 15 Q. B. Div. 228.)

Appeal from the judgment of the Queen's Bench Division refusing an application for a new trial, or to enter judgment for the defendant.

The action was for the price of wheat, or in the alternative for damages for nonacceptance of the wheat.

The statement of defence denied the contract of purchase, alleged that the wheat was sold by sample, and the bulk was not equal to the sample, and set up non-compliance with the statute of frauds.

The case was tried before Bulwer, Q. C., sitting as commissioner at the Chelmsford summer assizes, 1884, when the facts were as follows:

The defendant, a miller, bought of the plaintiff by oral contract through the plaintiff's agent eighty-eight quarters of wheat. The sale was by sample. The wheat was shipped by the plaintiff's agent on a barge for carriage to the defendant's mill, which was upon a navigable canal. The barge arrived at the mill on the evening of Tuesday the 25th of March, and at 8 o'clock on the morning of the 26th some of the sacks containing the wheat were, by direction of the defendant's foreman, hoisted up out of the barge on to the mill and examined by him. After twenty-four sacks had been hoisted up and examined the foreman sent for the defendant, who came to the mill and inspected the contents of the sacks already delivered, and ordered some more to be sent up for examination, and after having examined thirty-eight sacks in all, he at 9 o'clock told the bargeman to send up no more, as the wheat, he said, was not equal to sample. The defendant then on the same day went off to see the plaintiff's agent at a neighbouring market town, and told him that the wheat was not equal to sample, and that he should not take it. Some days afterwards, the exact interval, however, was not stated, the wheat taken into the mill was returned by defendant's order to the barge, which remained at the defendant's mill with the wheat in it, the plaintiff refusing to take the wheat away, for seven weeks and until after action was brought, when the wheat was sold by the order of a judge at chambers, and the proceeds paid into court to abide the event of the action.

The learned commissioner directed the jury, on the authority of Morton v. Tibbett, 15 Q. B. 428, and Kibble v. Gough, 38 L. T. (N. S.) 204, that there was evidence of an acceptance by the defendant sufficient to constitute a contract within the 17th section of the statute of frauds, although the defendant was not precluded from rejecting the wheat if not equal to sample. The jury found that the wheat was equal to sample, and that the defendant had accepted it within the meaning of the 17th section of the statute of frauds, and accordingly gave a verdict for the plaintiff.

A rule for a new trial, or to enter judgment for the defendant, was moved for on the ground that there was no evidence for the jury of an acceptance of the wheat by the defendant to satisfy the statute, but the Queen's Bench division (Lord Coleridge, C. J., and Cave, J.) refused the application.

Brett, M. R. It seems to me that the case of Kibble v. Gough, 38 L. T. (N. S.) 204, lays down the governing principle with regard to the question whether there is evidence of an acceptance to satisfy the 17th section of the statute of frauds. It was there pointed out that there must be under the statute both an acceptance and actual receipt, but such acceptance need not be an absolute acceptance; all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfill that contract. Cotton, L. J., in giving judgment in that case, said: "All that is wanted is a receipt and such an acceptance of the goods as shews that it has regard to the contract, but the contract may yet be left open to objection: so that it would not preclude a man from exercising such a power of rejection. I think that in this case enough had been done to satisfy the statute." Now what had been done in that case? The goods had been taken into the defendant's warehouse and kept for some time, though not so long as to make it unreasonable that the defendant should exercise his right of rejection if the goods had not been according to contract, and the defendant had inspected the goods. They therefore had been delivered, and actual possession of them had been taken, and they had been dealt with by the defendant for the purposes of the contract. It was held that under those circumstances what had been done in respect to the goods by the defendant must be considered as having been done with regard to a contract for the purchase of the goods, and as amounting to a recognition of the existence of such contract, and that therefore, though the defendant might still have a right to reject the goods if not equal to sample, there was evidence on which the jury might find that the defendant had accepted the goods within the meaning of the statute.

That being the law as laid down by that decision, what was the evidence on the question of acceptance in the present case? The wheat was sent to the defendant's mill in a barge, which was brought under the mill in the evening. The next morning a considerable quantity of wheat was taken up by the defendant's servants into the defendant's mill and remained there some time more or less until the defendant had opened the sacks and examined their contents to see if they corresponded with the sample. How could the defendant have these sacks taken in to his mill and there opened and examined without a recognition of the existence of a contract entitling him so to deal with them? How could any reasonable men come to any other conclusion from his dealing with them than that he had made a contract of purchase with regard to them, and that the goods were delivered to and received by him under such contract, and examined by him to see if they were according to the contract? It seems to me clear that under these circumstances there was evidence for the jury of an acceptance within the meaning of the statute. I can conceive of many cases in which what is done with regard to the delivery and receipt of the goods may not afford evidence of an acceptance. Suppose that goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them, to be turned out or refuses to have anything to do with them. There would there be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same.

I rely for the purposes of my judgment in the present case on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract. It appears to me that, having regard to the case of Kibble v. Gough, 38 L. T. (N. S.) 204, which is an authority binding on us, there was clearly evidence in this case for the jury of an acceptance, and that upon such evidence there was only one conclusion to which they reasonably could come. The counsel for the defendant placed reliance on the case of Rickard v. Moore, 38 L. T. (N. S.) 841. It is alleged that in that case Lord Bramwell doubted the correctness of what he had said in the previous case of Kibble v. Gough. However that may be, it is quite clear that that case cannot overrule Kibble v. Gough.

For these reasons I am of opinion that this appeal must be dismissed. Appeal dismissed.[24]

## SHINDLER v. HOUSTON.

(Court of Appeals of New York, 1848. 1 N. Y. 261, 49 Am. Dec. 316.)

On error from the Supreme Court. Houston sued Shindler in the Justices' Court, of the city of Troy, in assumpsit, for the price of a quantity of lumber. The plaintiff having recovered, the defendant appealed to the Mayor's Court of that city, and on the trial in that Court, the case was this:

The plaintiff was the owner of about 2070 feet of curled maple plank and scantling, which he had brought to Troy in a boat, and which after being inspected and measured, was piled on the dock apart from any other lumber. Soon after this, the plaintiff and defendant met at the place where the lumber lay. The plaintiff said to the defendant, "What will you give for the plank?" The defendant said he would give three cents a foot. The plaintiff then asked, "What will you give for the scantling?" The defendant replied, "One and a half cents a foot." The plaintiff then said, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill of it, and carry it to Mr. House, who would pay it. The next day the plaintiff, having procured the inspector's bill, presented it to House, who refused to pay it, on the ground that the instructions he had received from the defendant did not correspond with the plaintiff's statement of the contract. There was no note or memorandum of the contract in writing, nor was there any evidence of a delivery or acceptance of the lumber, except as above stated. At the prices agreed on, the lumber came to $52.51, no part of which was ever paid.

The Mayor's Court instructed the jury that if they were satisfied that it was the intention of the parties to consider the lumber delivered at the time of the bargain, and that nothing further was agreed or contemplated to be done, in order to change the title in, or possession of the lumber, the plaintiff was entitled to recover; that the sale was not within the statute of frauds, and did not require any note or memorandum in writing, provided they should find from the evidence, that there was a delivery and acceptance of the lumber at the time of the bargain. The defendant excepted and the jury found a verdict for the plaintiff, on which judgment was rendered in his favor.

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[24] Concurring opinions were delivered by Baggallay and Bowen, L. JJ. Compare Taylor v. Smith, 2 Q. B. 65 (1893).

The Supreme Court, on writ of error to the Mayor's Court, affirmed the judgment (see 1 Denio, 48), and the defendant brings error to this Court.

WRIGHT, J. There being no note or memorandum made in writing, of the contract or earnest paid, this is a case within the statute of frauds, unless there was an acceptance and receipt of the whole or a part of the property by the buyer. 2 R. S. 136, § 3. If there was an acceptance shewn sufficient to take the case out of the operation of the statute, it was of all the lumber, as it is not pretended that the entire property vested in the vendee by the acceptance and receipt of a part thereof. The question, therefore, for consideration upon the facts proved, is whether there was an acceptance and receipt of the lumber by Shindler, the vendee, within the intent and meaning of the statute.

It is to be regretted that the plain meaning of the statute should ever have been departed from, and that any thing short of an actual delivery and acceptance should have been regarded as satisfying its requirements, when the memorandum was omitted; but another rule of interpretation which admits of a constructive or symbolical delivery has become too firmly established now to be shaken. The uniform doctrine of the cases, however, has been, that in order to satisfy the statute there must be something more than mere words—that the act of accepting and receiving required to dispense with a note in writing, implies more than a simple act of the mind, unless the decision in Elmore v. Stone, 1 Taunton, 458, is an exception. This case, however, will be found upon examination to be in accordance with other cases, although the acts and circumstances relied upon to shew a delivery and acceptance, were extremely slight and equivocal; and hence the case was doubted in How v. Palmer, 3 Barn. & Ald. 324, and Proctor v. Jones, 2 Carr. & Payne, 534, and has been virtually overruled by subsequent decisions.

Far as the doctrine of constructive delivery has been sometimes carried, I have been unable to find any case, that comes up to dispensing with all acts of parties, and rests wholly upon the memory of witnesses as to the precise form of words to shew a delivery and receipt of the goods. The learned author of the Commentaries on American Law cites from the Pandects the doctrine that the consent of the party upon the spot is sufficient possession of a column of granite, which by its weight and magnitude, was not susceptible of any other delivery. But so far as this citation may be in opposition to the general current of decisions in the common law courts of England and of this country, it is sufficient perhaps to observe that the Roman law has nothing in it analogous to our statute of frauds. In Elmore v. Stone, expense was incurred by direction of the buyer, and the vendor, at his suggestion, removed the horses out of his sale stable into another, and kept them at livery for him. In Chaplin v. Rogers, 1 East, 192, to which we were referred on the argument, the buyer sold part of the hay, which the purchaser had taken away; thus dealing with it as if it were in his actual possession. In the case of Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74, to which we were also referred, no question of delivery under the statute of frauds arose. The sale was not an absolute one, but a pledge of the property. The cases of Elmore v. Stone and Chaplin v. Rogers are the most barren of acts indicating delivery, but these are not authority for the doctrine that words, unaccompanied by acts of the parties, are sufficient to satisfy the statute. Indeed, if any case could be shown which proceeds to that extent, and this court should be inclined to follow it, for all beneficial purposes, the law might as well be stricken from our statute book; for it was this species of evidence, so vague and unsatisfactory, and so fruitful of frauds and perjuries, that the Legislature aimed to repudiate.

So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with, the statute is not satisfied with any thing but unequivocal acts of the parties; not mere words that are liable to be misunderstood and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the acts connected with them, both of seller and buyer, were equivocal or unequivocal. The best considered cases hold that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold. Chitty on Contracts, 390, and cases cited; Hilliard on Sales, 135, and cases cited; 10 Bing. 102, 384.

But will proof of words alone shew a delivery and acceptance from which consequences like these may be reasonably inferred? Especially, if those words relate not to the question of delivery and acceptance, but to the contract itself? A. and B. verbally contract for the sale of chattels, for ready money; and without the payment of any part thereof, A. says, "I deliver the property to you," or, "It is yours," but there are no acts shewing a change of possession, or from which the fact may be inferred. B. refuses payment. Is the right of the vendor to retain possession as a lien for the price gone? Or, in the event of a subsequent discovery of a defect in the quantum or quality of the goods, has B. in the absence of all acts on his part shewing an ultimate acceptance of the possession concluded himself from taking any objection? I think not. As Justice Cowen remarks in the case of Artcher v. Zeh, 5 Hill, 205: "One object of the statute was to prevent perjury. The method taken was to have something done; not to rest every thing on mere oral agreement." The acts of the parties must be of such a character as to unequivocally place the property within the power, and under the exclusive dominion of the buyer.

This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. Thus, in Searles v. Keeves, 2 Esp. R. 598, a case which arose at a period when the English Courts were more inclined than recently to allow of a constructive delivery and acceptance, where a written order was given by the seller of goods to the buyer, directing the person in whose care the goods were to deliver them, which order was presented by the buyer, it was held that there was a sufficient delivery within the statute. So, also, in Hollingsworth v. Napier, 3 Caines, 182, 2 Am. Dec. 268, where the vendor delivered to his vendee a bill of parcels for goods lying in a public store, together with an order on the store keeper for their delivery, and the vendee, upon delivering the order demanded the goods, which were turned out to him, and he paid the amount of the storage, marked the bales with his initials, and returned them to the custody of the store keeper, it was held that the statute was satisfied.

But in cases like these, it would seem now to be necessary, that the party having the custody of the goods, and who is the agent of the vendor, should recognize the order given to the purchaser, and assent to retain the goods for him. A delivery to the vendee of the key of the warehouse in which the goods are lodged, or other indicia of property, where goods are ponderous and incapable of being handed over from one to another, was said by Lord Kenyon, in Chaplin v. Rogers, 1 East, 194, to be tantamount to an actual delivery. In Dodsley v. Varley, 12 Adol. & Ellis, 632, which was an action of assumpsit for wool bargained and sold, the Court said: "We think that upon the evidence, the place to which the wool was removed may be considered as the defendant's warehouse, and that he was in actual possession of it as soon as it was weighed and packed." In these cases, and in a large number of others that might be cited, the circumstances were unequivocal to shew, not merely a delivery to and acceptance of the property in the goods, but, what is always essential, a complete acceptance of the possession, by the buyer. The facts were more or less strong in the several cases, but the acts of the parties can scarcely be reconciled with any other presumption.

On the other hand, where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inference to be drawn from them, and hold the contract to be within the statute. In Baldy v. Parker, 2 B. & C. 37, A. purchased of B., a trader, several articles, amounting in the whole to £70. A. marked with a pencil some of the articles, saw others marked, and helped to cut off others. He then requested that a bill of the goods might be sent to him, which was done, together with the goods, but he declined to accept them. It was held that there was no delivery and acceptance to take the case out of the statute; and Lord C. J. Abbott, in speaking of the exception in the statute, justly remarked that: "It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer."

In Carter v. Touissant, 5 B. & Ald. 855, the circumstances were, that a horse was sold by verbal contract, but no time fixed for the payment of the price. The horse was to remain with the vendor for twenty days, without charge to the vendee. At the expiration of that time he was sent to grass by order of the vendee, and entered as one of the vendor's horses. The Court held that there was no acceptance of the horse by the vendee within the meaning of the statute.

In Tempest v. Fitzgerald, 3 Barn. & Ald. 680, A. agreed to purchase a horse from B. for cash, and take him away within a certain time. About the expiration of that time A. rode the horse, and gave directions as to his treatment, etc., but requested that he might remain in the possession of B. for a further time, at the expiration of which time he promised to take and pay for the horse, to which B. assented. The horse died before A. paid the price or took it away. It was held that there was no sufficient acceptance of the horse to render the vendee liable for the price.

In Howe v. Palmer, 3 B. & Al. 321, a vendee publicly agreed at a public market, with the agent of the vendor, to purchase twelve bushels of tares, (then in the vendor's possession constituting part of a larger quantity in bulk,) to remain in the vendor's possession until called for. The agent, on his return home, measured and set apart the twelve bushels. It was held that in this case there had been no acceptance, and the action would not lie.

In Kent v. Huskisson, 3 B. & P. 233, A. verbally ordered from B. a bale of sponge, which was sent. The bale was opened and examined, and the sponge returned by B., who at the same time wrote a letter to A., stating that he disapproved thereof. It was held that B. had not accepted the goods.

In Proctor v. Jones, 2 Car. & P. 532, it was said that the marking of casks of wine, sold by parol, and lying at the London docks, with the initials of the purchaser, at his request and in his presence, was not a sufficient acceptance within the statute, at least if the time of payment had not, when the casks were so marked, been fixed.

In Bailey v. Ogden, 3 John. 399, 3 Am. Dec. 509, an agreement with the vendor, on a parol contract for the sale of goods, about the storage of the goods, and the delivery by him of the export entry to the agent of the vendor, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an indicium of ownership.

Other comparatively recent English and American cases might be cited shewing, as has been said by Mr. Justice Coleridge, that "the tenor of modern decisions is to give to the words of the statute their fullest effect, and not to allow (so far as it is possible) of any constructive deliveries and acceptances."

I think I may affirm with safety that the doctrine is now clearly settled, that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract. But if the principles to be deduced from the recent decisions were otherwise, I should not be disposed, in the face of the plain and obvious meaning of the statute, to follow them. The statute of frauds of 29 Car. II, (and it is in substance re-enacted in this State,) was justly pronounced, nearly half a century since, by an eminent British Judge, "one of the wisest laws in the statute book." Its provisions apply with singular wisdom and beneficence, "to the daily contracts and practical affairs of mankind," relieving them of vagueness and uncertainty, and checking, to some extent, "the restless and reckless spirit of litigation."

Whilst this meritorious law is in the statute book, it is our business to enforce it in good faith, and according to its plain letter and spirit, without studying to fritter away its vitality in the attempt to uphold contracts which by its provisions are clearly void.

I am of the opinion that the judgment of the Supreme Court should be reversed.

Judgment reversed.[25]

## RODGERS et al. v. PHILLIPS et al.

(Court of Appeals of New York, 1869. 40 N. Y. 519.)

This action was brought to recover the purchase price of 188 tons of coal, amounting to the sum of $651.30. The coal was contracted to be sold by the plaintiffs to the defendants by an oral agreement, entered into prior to the 26th day of June, 1858. By the terms of this agreement, it was to be shipped on board a boat at Richmond, in the State of Pennsylvania, for the defendants, and to be carried from there to Twenty-Eighth street, on the East River, in the city of New York; the defendants paying the freight for the same. The coal was shipped by the plaintiffs on board the coal boat, I. K. Smith, at Richmond, for the defendants, on Saturday, the 26th day of June, 1858; and a bill of lading taken from the master by which the coal was to be delivered at Twenty-Eighth street, on the East River side of the city of New York, to the defendants, upon the payment of the freight by them. During the afternoon of the day when the coal was laden upon the boat, she commenced leaking, and finally sank on the morning of the following day. The boat and cargo remained in the water, where they sank, until they were finally removed by the public authorities as obstructions to navigation. On Monday, the 28th of June, 1858, the plaintiffs, who kept their office at the city of New York, received the bill of lading by mail; and on the same day they sent it with an invoice of the coal to the defendants' office. The invoice consisted of an unsubscribed bill of the coal. On Tuesday, the 29th, the defendant Oakley, together with Mr. Harriott, the secretary of the Brevoort Insurance Company, called at the plaintiff's office, and inquired of Mr. Rodgers, one of the plaintiffs, concerning the condition of the boat, how she had sunk, the cost of raising her, and what he could do it for. He answered that he could give no information in regard to the matter. Another witness, Hubbard, who was present at the same interview, stated that he understood from the conversation, that Harriott was to go to Philadelphia to see about raising the vessel. The next day but one succeeding this interview, which was the 1st day of July, the defendants sent back the bill of lading to the plaintiffs; and they returned it to the defendants the same day in a letter, saying that they had nothing to do with it. Upon this evidence, the defendants moved for a nonsuit, on the ground that no valid sale was established under the statute of frauds. The motion was denied, and the defendants excepted.

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[25] Concurring opinions were delivered by Gardiner and Bronson, JJ. Opinions in favor of affirming the judgment were delivered by Jewett, C. J., and Gray, J.

In addition to proving the condition of the boat at the time the coal was placed on board of her, and the manner of her sinking, the defendants proved by the defendant, Oakley, that he was a director in the Brevoort Insurance Company, and that, on the receipt of the bill of lading, he went to the office of that company and tried to effect an insurance on the coal. The insurance was refused on the ground that the boat was rated on the company's books as twelve years old, and notoriously rotten. After hearing of the sinking of the boat, Harriott, who went to the plaintiff's office with the defendant, Oakley, on Tuesday, went to Philadelphia and attended to the matter. What he did, beyond inquiring into the condition of the boat, was not made to appear. The proofs were thereupon closed; and the court refused to allow the defendants' counsel to go to the jury on the questions of fact involved in the case, on the ground that the defendants had failed to make out any defence to the action, and directed a verdict for the plaintiffs. The defendants excepted to the decision and direction of the court.

Upon the hearing of the exceptions, at the General Term, judgment was directed for the plaintiffs; and when that was entered the defendants appealed to this court.

DANIELS, J. A large portion of the evidence contained in the case was given upon the trial for the purpose of showing that the plaintiffs had negligently misconducted themselves in lading the coal upon an unsafe and unseaworthy vessel; and that in consequence of that misconduct the coal had been lost. This defense was properly rejected by the court, for the reason that it had not been set forth in the answer.

The disposition which should now be made of the controversy will therefore depend entirely upon the sufficiency of the evidence given upon the trial to establish the fact that the coal had been delivered to and accepted by the defendants. The contract for the sale of it was within the statute of frauds; and on that account, as it was not in writing, and nothing had been paid upon it by the direct terms of that statute it was void. Although the plaintiffs did perform all that would have been requisite to transfer the title to the coal to the purchasers, under the well-established rule of the common law, it does not follow that what they did would be attended with the same result under the rule prescribed by the statute. Where a valid and subsisting contract for the sale of personal property may be shown to exist, and by its terms the property is to be shipped by the vendor to the vendee, then a delivery of it to a responsible carrier for the vendee, to be carried and delivered to him, will ordinarily transfer the title to the vendee and place the property at his risk.

But this rule requires that the contract between the parties shall be at the time legal, valid and subsisting. It does not include cases like the present one, where on account of a failure to comply with the positive rule prescribed by the statute, the contract is void, and must remain so until some act has been performed that will have the effect of giving it legal validity. In cases like the present one, it is the statute, and not the common law, that has provided the mode by which the previously void agreement could be rendered legal and binding upon the parties. And that mode must be pursued; otherwise the agreement must remain without any binding force upon either of the parties. Until that may be done, the contract must remain entirely optional on the part of each of the parties. Even if the vendors elected to perform it, and deliver the property precisely as they had agreed to, it was still optional with the vendees whether they would receive it or not. And even if the former went so far as to actually deliver it, the vendees still had their election to either receive or refuse it.

This resulted from the unequivocal terms made use of in the statute. They required that the vendees under such a contract as was shown upon the trial of this cause, should not only receive, but in addition to that accept part of the property contracted to be sold to them, in order to render the contract binding upon them in law. Where the contract, or a note or memorandum of it has not been reduced to writing and subscribed by the parties to be charged by it, and no part of the purchase price has been paid, then the statute declares it to be void where the price amounts to the sum of $50 or upwards, unless "the buyer shall accept and receive part of such goods." 3 R. S. (5th Ed.) 222, subd. 2 of § 3. This statute is in substance the same as the previously existing English statute, and they have both been regarded as identical in the change they have produced in the common-law rule.

By the construction they have received, and which their language manifestly required, a mere delivery of the property contracted to be sold by the terms of the void contract has been held to be insufficient to vest the title to it in, or place it at the risk of, the vendee. But beyond that, it became necessary, under the rule adopted by the statute, that some part of the property should not only be delivered and received by the vendee, but that it should also be accepted by him. This acceptance of it involved something more than the act of the vendor in the delivery. It required that the vendee should also act, and that his act should be of such a nature as to indicate that he received and accepted the goods delivered as his property. He must receive and retain the articles delivered, intending thereby to assume the title to them to constitute the acceptance mentioned in the statute; when that has been done, then for the first time the void contract becomes valid and obligatory upon the parties to it.

This rule of construction was adopted at an early day by the English courts. Tempest v. Fitzgerald, 3 Barn. & Ald. 680; 5 E. C. L. 419; Carter v. Toussaint, 5 Barn. & Ald. 855; Baldey v. Parker, 2 Barn. & Cress. 37, 9 E. C. L. 16, 17. And since then it has been approved and applied by this court to the statute existing upon this subject in this State. Shindler v. Houston, 1 N. Y. 261, 265, 49 Am. Dec. 316. In the decision of that case, Judge Gardner stated the English rule as requiring that "there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner." He then adds: "This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties." Judge Wright said "that the acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer." Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inference to be drawn from them, and hold the contract to be within the statute. Id. 210, 211. And to this effect is the case of Denny v. Williams, 5 Allen (Mass.) 1. This it will be perceived is very decided language, but no more so, certainly, than was used in the enactment of the statute to which it was applied. And it was afterward followed and again applied in deciding the case of Brabin v. Hyde, 32 N. Y. 519.

The question in this case therefore is whether such an acceptance of the coal by the defendants was shown as placed it at their risk at the time when it was lost by the sinking of the vessel it was laden upon. And for the purpose of considering and deciding it, this case must be distinguished from those where the property contracted to be sold was delivered to a particular carrier designated and selected by the vendee for the purpose of receiving and accepting it. For in those cases the carrier, by the act of the vendee, became his agent and bound him by the receipt and acceptance of the property. Dawes v. Peck, 8 T. R. 330; Waldron v. Romaine, 22 N. Y. 368; Bushell v. Wheeler, 15 Ad. & Ell. (N. S.) 442.

This case differs from those in the circumstance that no such designation or selection was made by the defendants. The carrier to whom the property was delivered, to be carried to the defendants, was selected by the plaintiffs. The defendants in no manner authorized or participated in it, beyond the void authority conferred by the terms of their void contract. Being void, as it was, the plaintiffs could not avail themselves of its terms, for the purpose of binding or concluding the defendants by what they did under it. Whatever they did toward the performance of the contract they did for themselves, and at their own risk, until the defendants elected to change the risk, and did change it, by the acceptance of the property mentioned in the statute; what the evidence showed was a selection of the carrier by the plaintiffs, and a delivering of the coal to him, not an acceptance of it by the defendants. That acceptance required some act on the part of the vendees, to constitute it, performed after the coal had been separated from the mass and placed in such a condition as rendered that particular quantity capable of being accepted by the defendants.

The evidence not only failed to show the performance of any act of acceptance on the part of the defendants, but beyond that, it appeared that they did not hear of its shipment until the vessel it was laden upon had sunk to the bottom of the Schuylkill. There was nothing therefore in the case from which the defendants could be deemed to have accepted the coal at that time. It consequently continued to be the plaintiffs' property, remaining at their risk, and it was their loss when the vessel sunk, after it had been laden on board of her. And if the carrier became liable for the loss, his liability was to the plaintiffs, not to the defendants. That a mere delivery of property to a carrier selected to receive and carry it by the vendors will, in no legal sense, constitute an acceptance of it by the vendee, and for that reason exclude the case from the operation of the statute, has been distinctly held in several adjudged and well-considered decisions.

This point was directly presented in the case of Maxwell v. Brown, 39 Me. 98, 63 Am. Dec. 605; and after an examination and reference to the English authorities, the court held that the delivery to the carrier was insufficient to show an acceptance by the vendee. The same point arose, under slightly different circumstances, in the case of Frostburg Min. Co. v. New Eng. Glass Co., 9 Cush. (Mass.) 115; and it was disposed of in the same way. And a delivery to a carrier selected by the vendor for the transportation of the property, where that was done in conformtiy to the terms of the void contract, was held to be in no sense an acceptance by the vendee, in the cases of Hanson v. Armitage, 7 Eng. C. L. 191, Acebal v. Levy, 25 Eng. C. L. 180, Meredith v. Meigh, 75 Eng. C. L. 363, Coats v. Chaplin, 43 Eng. C. L. 831, Norman v. Phillips, 14 Mees. & Welsb. 278, Farina v. Home, 16 Mees. & Welsb. 119, Coombs v. Bristol, etc., Ry. Co., 3 Hurlst. & Norm. 510, and Hart v. Bush, 1 Ell., Bl. & Ell. 494; and the cases of Howe v. Palmer, 5 Eng. C. L. 303, Bentall v. Brewer, 10 Eng. C. L. 138, Hunt v. Hecht, 20 Eng. Law & Eq. 524, Holmes v. Haskins, 28 Eng. Law & Eq., 564, and Castle v. Sworder, 5 Hurlst. & Norm. 281, though differing in their circumstances, are in substance to the same effect.

Up to the time when the coal was lost by the sinking of the vessel having it on board, no act was performed by the defendants, from which it could be even colorably claimed that they had accepted the coal or become invested with the title to it. For it was not until the day afterwards that the invoice and bill of lading were delivered to them; and then the rights of the parties had become fixed by the loss of the property. The loss was then that of the plaintiffs, and nothing afterwards transpired warranting the conclusion that the defendants intended to shift it and impose it upon themselves.

Assuming, as it may properly be done, that the acceptance of the bill of lading by the defendants, under ordinary circumstances, would have been equivalent to the acceptance of the property mentioned in it, yet that could not be the effect of it where, as in this case, the property had been previously lost. Certainly not, unless the acceptance was made with knowledge of the circumstances affecting the propriety of it existing at the time it occurred.

But even if it could have produced that result, something more would have to be shown, for the purpose of establishing the acceptance than was done upon the trial of this action. What transpired when the bill of lading was left at the defendants' office was not made to appear. All that was shown upon the subject of an acceptance of it was that one of the defendants, after its receipt, applied for an insurance upon the coal, and failed to procure it on account of the unseaworthy character of the vessel upon which the plaintiff had placed it. This was clearly insufficient for that purpose because it did not show that the defendants had dealt with the property as their own, but merely that they had attempted to do so and failed. What they did in this respect was done before they had received any intelligence of the misfortune to the property. And even if, prior to that time, they had determined to accept the shipment by accepting the bill of lading, upon the supposition and belief that the property was then afloat, they became at liberty to rescind their determination and refuse to receive it, as soon as they discovered that it had been found under a mistake of a material fact affecting it.

When that fact was discovered, an interview took place between one of the defendants and one of the plaintiffs, but nothing was settled by what then occurred. After that Mr. Harriott was sent to Philadelphia by the defendants, and he testified that he attended to the matter. But what he did beyond inquiring into the condition of the boat was neither stated by himself nor by any other witness. Neither of these circumstances, nor all of them combined, so far tended to prove an acceptance of the property as to justify the court in leaving that fact to the consideration and decision of the jury. When the additional circumstance is borne in mind, that on Thursday of the same week, the defendants sent back the bill of lading to the plaintiffs, it will be perceived that there was absolutely nothing from which an acceptance of the property shipped could be even plausibly maintained.

At the time the bill of lading was delivered to them, they had a reasonable time after ascertaining the circumstances in which to determine whether they would accept or reject it, the same as they would have had upon an actual delivery of the property itself, for which the bill was merely a substitute. Within that time they rejected and returned it to the plaintiffs, which plainly left the transaction invalid as a sale, under the direct prohibition of the statute. In this respect the case had no more foundation for its support than Norman v. Phillip, Farina v. Home, and Coats v. Chapin, supra, and Bill v. Bament, 9 Mees. & Welsb. 35 had, in which it was held that no acceptance of the property by the buyer could be inferred.

The court at the trial erred in refusing to nonsuit the plaintiffs and in directing a verdict against the defendants. The judgment should be reversed and a new trial ordered.[26]

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[26] WOODRUFF, J., also delivered an opinion for reversal, in the course of which he said: "It has sometimes been argued that delivery to a carrier designated by a buyer will suffice to satisfy the statute, although delivering to a general carrier will not; but this distinction cannot be sustained where the carrier has no other authority than to transport the goods. In Aceba v. Levy, 10 Bing. 376, the delivery was on board a ship chartered by the buyer, and yet it was not held to constitute an acceptance within the statute; and see, also, Meredith v. Meigh et al., 2 Ellis & Bl. 364."

## DIERSON v. PETERSMEYER.

(Supreme Court of Iowa, 1899. 109 Iowa, 233, 80 N. W. 389.)

Action for pop corn sold and delivered. From judgment on verdict directed for the defendant, the plaintiff appeals.

Ladd, J. The pop corn was in the crib when examined by the defendant, and he agreed to pay 50 cents per 100 pounds for it, sorted, sewed in bags, and delivered at Odebolt. Four loads were hauled to that place, and defendant directed the plaintiff to drive to a car as soon as others had unloaded. One load was weighed on defendant's scales, and then taken to the car. The defendant cut open two sacks, examined the corn, and refused to take it because not properly sorted. Later, the plaintiff had the corn weighed and put into the car, unknown to defendant. The record does not disclose what afterwards became of the corn. Very evidently the delivery was not such as is contemplated by section 4626 of the Code. To take a contract out of the statute of frauds, the vendor must not only act with the purpose of vesting the right of possession in the vendee, but the latter must actually accept with the intention of taking possession as owner. Remick v. Sandford, 120 Mass. 309; Knight v. Mann, 118 Mass. 143; Young v. Blaisdell, 60 Me. 272; Stone v. Browning, 51 N. Y. 211; Smith v. Hudson, 6 Best & S. 431; 8 Am. & Eng. Enc. Law, 738.

However we might regard the act of the plaintiff, there was no acceptance of the corn, but a refusal to receive it. In Shepherd v. Pressey, 32 N. H. 55, the court said: "No act of the seller alone, in however strict conformity to the terms of the contract, will satisfy the statute. There must be acts of the buyer, of accepting and actually receiving the goods sold, beyond the mere fact of entering into the contract, to bind the latter." Maxwell v. Brown, 39 Me. 101, 63 Am. Dec. 605; Boardman v. Spooner, 13 Allen (Mass.) 357, 90 Am. Dec. 196; Prescott v. Locke, 51 N. H. 94, 12 Am. Rep. 55.

When making the contract, the defendant took some corn in a small sack to send away as a sample. He simply helped himself to this, and it was neither delivered nor taken as part of the corn bought. No part of that sold was accepted.

Merely preparing it for market was not labor expended in producing or procuring it. Lewis v. Evans, 108 Iowa, 296, 79 N. W. 81.

The errors assigned and argued relating to striking out of certain evidence require no attention, as, if conceded, the rulings were without prejudice. All the evidence adduced fell short of making out a case, and the court was right in directing a verdict. Affirmed.[27]

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[27] In Stone v. Browning, 68 N. Y. 598 (1877), the court said: "It is argued that it is unreasonable to suppose that the object of sending the goods to the defendants' store was merely to enable them to decide whether they would purchase them or not. It perhaps was not the intention of the plain-

## ATHERTON et al. v. NEWHALL et al.

(Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 141, 25 Am. Rep. 47.)

Contract to recover the price of 660 sides of sole leather. At the trial in the Superior Court, before Gardner, J., it appeared that the plaintiffs were dealers in leather in Boston, and that the defendants were manufacturers of boots and shoes in Lynn. One of the plaintiffs testified that the defendant Newhall called at their store on Saturday, November 9, 1872, examined some leather, and said he would take "what leather was adapted to his purpose," being leather "light weight" in thickness, out of a certain lot of about 800 sides which were piled up in the store; and that, after Newhall had gone, he assisted in sorting out the leather intended for the defendants, which was then rolled up into 44 rolls, containing 660 sides, weighed, marked with the defendants' names, and placed near the front door of the store, ready for delivery. It was also in evidence that in the afternoon of the same day an expressman, who was in the habit of calling at the plaintiffs' store for goods for Lynn, called and took six rolls of the leather, containing 90 sides, which was all his wagon could carry, with the goods then on it, but did not deliver them until the Monday following to the defendants, who were regular customers of his; but in this case no order had been given to him by either party. The plaintiffs' store with its contents, including the remaining 570 sides of leather, was burned in the great fire of November 9, 1872. On Monday, November 11, 1872, the defendant Newhall called on the plaintiffs and produced the bill, which he had received from the plaintiffs, for the 660 sides, and requested their bookkeeper to correct the bill so as to correspond with the amount of leather actually received by him, and the bookkeeper thereupon deducted the 570 sides from the bill. On March 20, 1873, he tendered to the plaintiff $394, the amount due for the 90 sides, which they declined to receive.

Upon this evidence, the judge ruled that there was no evidence of any delivery to or acceptance by the defendants of the 570 sides of leather, directed the jury to return a verdict for the price of the 90 sides, and reported the case for the consideration of this court. If the action could be maintained for the whole 660 sides, the verdict was to be set aside; otherwise, judgment was to be entered on the verdict.

tiffs that the defendants should have the option of rejecting the goods, unless some just reason for so doing should be developed by the examination; but, nevertheless, so long as the plaintiffs reposed upon a verbal contract, void under the statute, they exposed themselves even to an unjust refusal to accept. The only mode of securing themselves against such a result was to obtain a written memorandum of the purchase. The injustice of the refusal, if it were unjust, could not supply the place of an acceptance or of a written contract."

GRAY, C. J. It is unnecessary to consider whether there was a sufficient delivery to complete the sale, because it is quite clear, upon the authorities, that there was no such acceptance and receipt of part of the goods as would satisfy the statute of frauds. Gen. Sts. c. 105, § 5. Such acceptance must be by the buyer himself, or by some one authorized to accept in his behalf. The acts of the buyer on Saturday did not constitute such an acceptance, because, according to the seller's own testimony, the buyer merely agreed to take all the sides of leather of a certain thickness, which were not then set apart by themselves, but formed part of a large pile from which they were afterwards to be selected by the seller. Knight v. Mann, 118 Mass. 143. The receipt of part of the leather by the expressman did not constitute such an acceptance, because he was not authorized to accept so as to bind the buyer. Johnson v. Cuttle, 105 Mass. 447, 7 Am. Rep. 545. The acceptance by the buyer on Monday, of the part brought by the expressman, was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with an intention to perform the whole contract and to assert the buyer's ownership under it, but, on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received. Townsend v. Hargraves, 118 Mass. 325, 333; Remick v. Sandford, 120 Mass. 309.

Judgment on the verdict.

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## JOHNSTON v. TRASK et al.

(Court of Appeals of New York, 1889. 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394.)

This was an action for a breach of contract.

Since January, 1882, the defendants have been bankers and brokers, doing business as partners under a firm name. On the trial of the issues, the plaintiff testified that on the 18th day of January, 1882, the managing partner of the firm, at its place of business, orally agreed with the plaintiff to purchase for him, if they could be bought in the market, income mortgage bonds of the Ohio Central Railroad of the par value of $10,000, "and [giving the language of said partner] any time you want to get rid of them, we will take them off of your hands at what they cost you." Later in the day, the defendants reported to the plaintiff that they had purchased the bonds for $4,800, and their commissions were $12.50; and thereupon the plaintiff paid $1,000 towards the purchase price. The bonds were retained by the defendants as security for the sums due from the plaintiff to them until November 16, 1882, when the plaintiff paid the full purchase price for the bonds, commissions, and interest, and took them into his possession. The market price of the bonds declined until April 28, 1884, when they were selling for about 10 cents on a dollar. On this date the plaintiff tendered the bonds to the defendants, and demanded that they should pay him $4,812.50, which they refused to do; and April 30, 1884, this action was brought, on contract, to recover that sum. The defendants did not contradict the plaintiff's evidence, which was corroborated by three witnesses; but at the close of his case they moved for a nonsuit on the grounds:

First. That the oral contract was void for not complying with the following section of the statute of frauds:

"Sec. 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall, at the time, pay some part of the purchase money." * * * [28]

FOLLETT, C. J. An oral contract by which a person sells his own chattels or choses in action for more than $50, payment and delivery being made, and agrees to take them back from, and repay the purchase price to, the purchaser on demand, is an entire contract; and the promise to take back the property, and repay the purchase price, is not void by the third section of the statute of frauds. Wooster v. Sage, 67 N. Y. 67; Fitzpatrick v. Woodruff, 96 N. Y. 561; White v. Knapp, 47 Barb. 549; Williams v. Burgess, 10 Adol. & E. 499; Fay v. Wheeler, 44 Vt. 292; Dickinson v. Dickinson, 29 Conn. 600; 1 Benj. Sales, (Corbin's Ed.) § 169.

Executed contracts of sale, embracing a promise by vendors of chattels that in case they do not suit the purchaser, or do not possess certain specified qualities, the vendor will repay to the vendee the purchase price upon their return, have been frequently considered by the courts, (Towers v. Barrett, 1 D. & E. 133; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595) but no case has been cited holding that such a promise on the part of a vendor is an independent contract. When an agent, by an oral contract, sells and delivers the goods of a disclosed principal, his personal oral warranty of quality is not a contract independent of the contract of sale, but is a part of it, and one consideration is sufficient to support the sale and warranty. The oral contract of the defendants that they would purchase for the plaintiff in the market, at market rates, the bonds, for the usual compensation, and, in case he should thereafter become dissatisfied with the bonds, that they would, on demand, take them off his hands at what they cost him, was a single contract. Under this contract, the bonds were purchased, and held by the defendants until the purchase price and their commissions were paid, and then they delivered the bonds to the plaintiff. The promise of the defendants that they would take the bonds off the plaintiff's hands at what they cost him, upon request, is not a contract for the sale of goods, chattels, or things in action, within the third section of the statute of frauds, but is a provision for the rescission of the entire contract, and is valid.

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[28] Part of the statement of facts and part of the opinion are omitted.

The learned counsel for the appellant, in support of his contention, cites Hagar v. King, 38 Barb. 200. In that case a firm was indebted to the plaintiffs in the action for work performed in constructing part of a railroad. The defendant, who was one of the firm, asked the plaintiffs to take from the railroad corporation its bonds in payment of the debt, orally agreeing with the plaintiffs, for himself, that, if they would so take the bonds, he (not the firm) would, within 10 days, take the bonds from and pay to the plaintiffs the amount of the firm's debt. The plaintiffs assented to the proposal. Afterwards they accepted from the corporation its due-bill for the amount due them for their work, payable in the bonds of the corporation, and gave a receipt for all of their demands for work done on the road. The plaintiffs then indorsed the due-bill, delivered it to the corporation, and received the bonds. Within 10 days the plaintiffs tendered the bonds to the defendant, and demanded the amount for which they were taken in payment. It was held that the oral agreement embraced two contracts,—one to accept the bonds in payment of the debt, and another to purchase the bonds at a future day at a given price,—and that the latter contract was within the third section of the statute of frauds, and void. That case is easily distinguishable from the one at bar. The defendant in that case, as an individual, was not indebted to the plaintiffs, and his individual contract to take back the bonds was held to be distinct from the contract by which the firm's debt was paid in the manner described. * * *

Judgment affirmed.

## CALVERT v. SCHULTZ.

(Supreme Court of Michigan, 1906. 143 Mich. 441, 106 N. W. 1123.)

Assumpsit by George T. Calvert and Elmer C. Calvert, copartners as J. Calvert's Sons, against Frank E. Schultz, for goods sold and delivered. There was judgment for defendant on a verdict directed by the court, and plaintiffs bring error. Affirmed.

Montgomery, J. March 7, 1903, defendant gave plaintiffs a verbal order for a car of Jackson Hill coal worth $179.03, then in the Michigan Central Railroad yards at Detroit, Mich. Immediately upon receipt of this order, plaintiffs telephoned to the railroad company to turn the car over to defendant, and, on the same day, sent to the railroad company a written order to the same effect. This is the method by which delivery of coal in car load lots is usually made.

The same day, an invoice of the coal was sent to the defendant. The car was put on the Twentieth street siding by the railroad company on March 17th. The day before this, March 16th (nine days after the railroad company had been ordered by plaintiffs to turn the car over to defendant), defendant countermanded his order.

At the trial, defendant claimed the verbal order was within the statute of frauds, and therefore void. Plaintiffs claimed that no written contract was necessary, because of a custom existing among coal dealers, by which the direction to the railroad company to turn the coal over to the purchaser constituted delivery and acceptance. Frequently before this, delivery of other car load lots had been made to defendant himself in accordance with this custom. At the conclusion of plaintiff's testimony, the trial court directed a verdict for defendant because the custom had not been proven.

The conclusion reached was right. There was no offer to show an authority conferred by the defendant upon the railroad company to accept this coal for him. In the absence of such authority, delivery to the company was not delivery to the defendant. There was, indeed, no delivery to the carrier; the coal was already in its possession. There was nothing but a direction to the carrier, who held possession for plaintiff, to make delivery to defendant. Defendant was no party to this, except as he became such by virtue of his parol contract wholly void by the statute of frauds. That this was not delivery to or acceptance by defendant is clear. 1 Mechem on Sales, §§ 356, 358, 365; Smith v. Brennan, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867; Grimes v. Van Vechten, 20 Mich. 410; Gatiss v. Cyr, 134 Mich. 233, 96 N. W. 26, 2 Ann. Cas. 544.

The claimed custom does not change this rule, because it is apparent that the evidence of acceptance of coal by purchasers under similar circumstances proves no more than that the great majority of purchasers would not insist on the defense of the statute of frauds. In so far as the witnesses undertook to testify that an order to the carrier was a delivery or acceptance by custom, they assumed to testify to legal conclusions. But, however well such custom might have been proved, it could not be permitted to override the express words of the statute. Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609; 29 Am. & Eng. Enc. L. (2d. Ed.) pp. 378, 381.

The judgment is affirmed.

## SECTION 5.—EARNEST OR PART PAYMENT

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### JENNINGS & SILVEY v. DUNHAM.

(Court of Appeals at Kansas City, Missouri, 1895. 60 Mo. App. 635.)

Ellison, J.[29] Plaintiffs sued the defendant for damages in failing to take of them a lot of hogs, according to a contract between them. Defendant prevailed in the trial court. Plaintiffs contracted with defendant to sell him a large number of hogs. Some of them were to be fat, and others stock hogs. They were to be delivered at Seymour. The evidence conflicts as to the exact day of delivery.

1. The first question presented relates to the statute of frauds. Our statute, section 5187, Revised Statutes, 1889, provides that no sale of personal property of the price of $30 or more, shall be valid, unless the buyer accept and receive a part of the property, "or give something in earnest to bind the bargain, or in part payment," or unless some written memorandum be made. There was no delivery of any part of the hogs at the time of making the contract, nor was there any written memorandum of the sale; and the question arising on the evidence is, was there a part payment? It was shown that plaintiffs and defendant at the making of the contract, each placed the sum of $50 in the hands of a third party, the plaintiffs' theory at the trial being that the sum put up by defendant was to be a part payment; while on the other hand there was evidence in defendant's behalf tending strongly to prove that each party respectively put up these sums as a "forfeit," so that the party failing to perform his contract should forfeit the amount put up by such party; the party not in default should receive the whole sum put up. The trial court instructed the jury, that, if the money was placed in the hands of a third party as money to be forfeited by the defaulting party, it was not a payment and the contract was invalid.

A literal reading of the statute undoubtedly makes a distinction between something which is given in earnest to bind the bargain, and that which is given in part payment. Originally this "earnest" was not necessarily a part payment. It was a custom under the common law, and seems also to have been a custom in other countries than England to give something to bind a bargain. In some countries some act was performed. Story on Sales, § 273. Benjamin states in his work on Sales (section 196) that one species of earnest in the Roman law was a payment of a sum which if the sale was carried out was to be credited on the price, but which carried the understanding that it was forfeit money if the sale was not completed by the buyer; and if the contract was not performed by the seller, he was to return to the buyer the money advanced together with a like sum as a forfeit on his part. Whether a sum which is termed forfeit money was ever a species of earnest by the common law need not now be investigated, since it has ceased to be of practical importance. It is now considered, that giving something in earnest to bind the bargain, and giving something in payment mean the same thing; that is, a part payment of the price. Benjamin on Sales, § 189; Story on Sales, §§ 273, 275. So, while in some countries in olden times, "earnest to bind the bargain" might consist of forfeit money, it is not so now. In modern times, earnest must be a part payment of the price. And, where the parties to a contract put up a sum of money to be forfeited to the nondefaulting party, it is not a part payment, and therefore does not take the contract out of the statute of frauds. This was directly so held in Howe v. Hayward, 108 Mass. 54. The case of Alexander v. Moore, 19 Mo. 143, which has been cited by plaintiffs, is not in point; that case was where a part payment of the price was put into the hands of a third party by the purchaser. * * *

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[29] Part of the opinion is omitted.

A full consideration of the points made by plaintiffs, has not led us to the discovery of anything which would justify our interference with the judgment, and it is accordingly affirmed. All concur.

## EDGERTON v. HODGE.

(Supreme Court of Vermont, 1869. 41 Vt. 676.)

Assumpsit, which was referred to a referee, who reported:

"That on the 30th day of June, 1864, the parties made an agreement by parol, by which the defendant agreed to sell to the plaintiff what new milk cheese he then had on hand, and unsold, amounting to 975 lbs., and the new milk cheese he should make thereafter during the season, and the plaintiff agreed to pay the defendant therefor at the rate of fifteen and a half cents per pound, and every twenty days thereafter agreed to call at the defendant's house in Dorset, select such cheese as would be fit for market, attend its weight there, and pay the defendant for the cheese so selected and weighed, and then the defendant was to deliver the same to the plaintiff at the railroad depot in Manchester. The day after the above agreement was made, the defendant, by his son, Albert Hodge, wrote and sent by mail a letter to the plaintiff (a copy of which is annexed, dated July 1, 1864,) depositing the same at the post office in East Rupert, and directed to the plaintiff at Pawlet, and received by him by mail on the same day. The next day, after the return mail from Pawlet to East Rupert had gone out, it being on Saturday, the plaintiff enclosed in a letter, directed to the defendant, at East Rupert, and left it in the post office at Pawlet, to be carried by mail to the defendant, the sum of fifty dollars. (A copy of plaintiff's letter is hereunto annexed, and the envelope enclosing the fifty dollars is postmarked 'Pawlet, July 4.') This letter of the plaintiff was, on the 8th day of July, 1864, handed to the said Albert Hodge, by the postmaster of East Rupert, and it was on the same day carried by him to the defendant, opened by the said Albert, the fifty dollars refused to be received by the defendant, and the letter of the plaintiff, with the fifty dollars, and the envelope enclosing them, were, by mail, returned to the plaintiff, with no communication accompanying them from the defendant. The plaintiff received the so enclosed wrapper, money and letter, on the 9th of July, 1864, and kept the same fifty dollars for six months thereafter. A daily mail is carried between the postoffices of Pawlet and East Rupert, a distance of six miles. On the 20th day of July, 1864, the plaintiff sent word to the defendant to deliver what cheese he had fit for market to the depot in Manchester. The defendant replied to the messenger that he had no cheese for the plaintiff. No other communication ever took place between the parties in regard to the cheese after the return of the money as above stated until this suit was brought. The defendant sold all his cheese to other parties, making his first sale on the 26th day of July, 1864.

"If the court shall be of opinion that from the foregoing facts the plaintiff is entitled to recover, and that the rule of damages should be the New York market price for cheese for the season of 1864, deducting freight and commission, then I find due the plaintiff $411.01. If the current price in the country, paid by purchasers and sent by them to market, is to be the rule, then I find due the plaintiff the sum of $306.32."

"Dorset, July 1st, 1864.

"Mr. Edgerton—Sir: According to our talk yesterday you bought my cheese for the season. I shall stand to it, but shall want you to pay me fifty dollars to bind it. I spose there is nothing holding unless there is money paid. I do not wish you to think I wish to fly from letting you have it so that it is sure. I will pay you interest on the money until the last cheese is delivered.

"Yours in haste, J. H. C. Hodge, per A. H."

"Pawlet, July 2, 1864.

"Mr. Hodge—Dear Sir: I enclose you fifty dollars to apply on your dairy of cheese as you proposed.

"Yours truly, S. Edgerton."

The court at the March term, 1868, Pierpoint, C. J., presiding, rendered judgment on the report that the plaintiff recover of the defendant the smaller sum reported by the referee, and for his costs, to which the defendant excepted.

Wilson, J. The parol agreement, entered into by the parties, June 30th, being for the sale of goods, wares and merchandise for the price of forty dollars and more, is within the statute of frauds, and inoperative, unless taken out of the statute by the subsequent acts of the parties. It is claimed by the plaintiff that the defendant's letter under date of July 1st. and the depositing of the plaintiff's letter with the fifty dollars in the postoffice on the 2d of that month, constitute a payment of part of the purchase money within the meaning of the statute. It will be observed that when those letters were written, no binding agreement had been concluded. The defendant, in his letter of July 1st, says: "According to our talk yesterday, you bought my cheese for the season. I shall stand to it, but shall want fifty dollars to bind it." By that letter the plaintiff was notified that he could make the bargain binding upon himself as well as the defendant, by paying to the defendant the sum demanded for that purpose. The plaintiff on the 2d day of July enclosed fifty dollars in a letter, directed to the defendant and deposited it in the postoffice, which letter was delivered to the defendant on the 8th of that month. He did not accept the money, but returned it to the plaintiff.

It is clear that the act of depositing the letter and the money in the postoffice was not a payment to the defendant. His letter did not direct the money to be sent by mail; it contains nothing that would indicate that the defendant expected the plaintiff would reply by letter, or accept the proposition by depositing the money in the postoffice; and the fact that the defendant by letter offered to allow the plaintiff to perfect the agreement, by paying part of the purchase money, did not authorize or invite the plaintiff to send the money by mail, or make the mail the defendant's carrier of the money. The language of the defendant's letter is: "I shall want you to pay me fifty dollars to bind it," that is, to make it a valid contract.

The money, when deposited in the postoffice, belonged to the plaintiff; it belonged to the plaintiff while being carried by mail to the defendant, and it would continue the property of the plaintiff unless accepted by the defendant. The plaintiff took the risk not only of the safe conveyance of the money to the defendant, but also as to the willingness of the defendant to accept it. The defendant's letter, not constituting such a note or memorandum of the agreement as the statute required, left it optional with the defendant to accept or refuse part payment when offered to him, the same as if the defendant had sent to the plaintiff a verbal communication of the same import as the defendant's letter.

A point is made by counsel as to whether the money was conveyed and delivered or offered to the defendant, within a reasonable time after his letter was received by the plaintiff, but it seems to us that the time the money was offered is not material. We think, even if the plaintiff had gone immediately after receiving the defendant's letter, and offered and tendered to him the fifty dollars, the defendant would have been under no legal obligation to accept it. The mere offer of the defendant to receive the money would not estop him from refusing to accept it; but in order to take the case out of the operation of the statute, it required the agreement or consent of both parties, as to payment by the plaintiff and acceptance of it by the defendant.

Upon the facts of this case, we think the rights of the parties rest upon and are to be determined by the verbal agreement entered into by them on the 30th of June, and that their subsequent attempts to make that agreement a valid contract can not aid the plaintiff. The statute provides that "no contract for the sale of any goods, wares or merchandise, for the price of forty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The very language of the statute above quoted implies that in whichever way the parties verbally agree or propose that a contract for the sale of goods, wares or merchandise, for the price of $40 or more, shall be made exempt from the statute of frauds, whether it be by the purchaser accepting and receiving part of the goods so sold, by giving something in earnest to bind the bargain, or in part payment, or by making a note or memorandum of the bargain, it must be done, if done at all, by the consent of both parties. It is obvious that it would require the consent of the purchaser to accept and receive part of the goods, and he could not receive them unless by consent of the seller; the purchaser could not give something in earnest to bind the bargain, or in part payment, unless the seller accept and receive it; nor could a note or memorandum of the bargain be made and signed unless by the consent of the party to be charged thereby.

A valid contract is an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act; and each acquires a right to what the other promises; but if the parties, in making a contract like the present one, omit to do what the statute requires to be done to make a valid contract, it would require the consent of both parties to supply the thing omitted. Suppose it had been one stipulation of the verbal agreement on the 30th of June that the plaintiff should give and the defendant receive something in earnest to bind the bargain, and in pursuance of such stipulation the plaintiff had then offered to give or pay the amount so stipulated, and the defendant had refused to receive it, saying that he preferred not to receive any money until he had delivered the whole or part of the property, or had refused to accept the money so offered, or do any other act to bind the bargain, without giving any reason for such refusal, it would be evident that he did not intend to make a binding contract.

But the fact that he had made such verbal agreement to receive something or to do some other act to bind the bargain, and that the plaintiff was ready and offered to comply on his part, would not take the agreement out of the statute. A verbal stipulation to give and to receive something in earnest to bind the bargain or in part payment, or a verbal promise to make a note or memorandum in writing necessary to exempt the agreement from the operation of the statute, is as much within the statute of frauds as is the agreement or contract taken as a whole; and a note or memorandum in relation to giving something in earnest to bind the bargain, or in part payment, which is insufficient of itself to take the contract out of the statute, is also insufficient to make the contract binding upon either party.

The judgment of the county court is reversed and judgment for the defendant for his costs.

## DRIGGS v. BUSH.

(Supreme Court of Michigan, 1908. 152 Mich. 53, 115 N. W. 985, 15 L. R. A. [N. S.] 654, 125 Am. St. Rep. 389; 15 Ann. Cas. 30.)

Assumpsit by Hue H. Driggs against Levi Bush and William Dean for breach of a contract for the sale of certain hay. There was judgment for plaintiff, and defendants bring error. Affirmed.

Montgomery, J. The plaintiff is a buyer of hay, and through his agents, Homer B. McWilliams and John Van Horn, made a contract with the defendants, who own and operate two farms in Van Buren county, and who were the joint owners of the hay crop thereon, for the purchase of 24 tons of hay or more at the option of the defendants.

The contract was by parol, and, as appears by the testimony offered on behalf of the plaintiff, was as follows: "Mr. Dean said: 'I want $10 a ton and you bale the hay.' We finally bought all of the hay for $10 a ton, and we to do the baling, and we were to take the hay the first cars we could get at Gobleville after the hay was baled." The testimony of the other witness for plaintiff does not vary materially from this, he stating: "We were to pay him $10 a ton for it, and we was to pay for the baling."

It was also a part of the agreement that the defendants were to draw the hay to Gobleville and place the same on board cars. After the contract was made, the plaintiff sent balers to the premises of the defendants who baled the hay, the defendants being present and assisting in the work. The price paid for baling the hay was $1.10 per ton, or $33.55, that being the regular price for such services. The defendants subsequently refused performance of the contract, and this action was brought to recover damages for the breach. Plaintiff was permitted to recover below the difference between the purchase price of the hay and its actual market price at the date when delivery was contemplated. Defendants bring error, and contend that the contract was void under the statute of frauds, and has never been validated, and this presents the principal question for our consideration.

Our statute of frauds (Comp. Laws 1897, § 9516) reads as follows: "No contract for the sale of any goods, wares or merchandise for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest, to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized."

It is obvious that at the time this contract was made there was no such delivery or part payment as satisfied the terms of this statute. But as this statute does not require the payment or acceptance to be at the time of the making of the contract, as in the case in New York and some other states (see 1 Mechem on Sales, § 419), it is competent for the parties to validate their contract by any act which amounts to a delivery and acceptance or to a payment. The circuit judge was of the opinion that when the hay was baled by the plaintiff's agents upon the premises of the defendants and with their cooperation, this constituted such a delivery and acceptance as would answer the requirements of the statute of frauds.

It is strenuously insisted that there was no such delivery or acceptance, and plaintiff's counsel do not seek to maintain that there was. Without passing directly upon the question, therefore, in this case, we may assume that there was no such completed delivery as the statute requires, and that the defendants still retained the title to the property after the same was baled. We are not concerned with the correctness of the reasoning of the circuit judge if the correct result was reached. The question occurs, therefore, whether the expenditure of $1.10 per ton upon this hay, which remained the property of the defendants, which expenditure was received and accepted by them, and was made in pursuance of the contract between the parties, was such a part payment as answered the requirements of the statute.

It is contended that the thing in earnest must be actually paid, and received by the seller. This we fully accept. But there can be no doubt in this case that the service of baling this hay was received and accepted by these defendants, and if this was done at a time while the hay remained their property, and such service was received in pursuance of the contract made between the parties, we can conceive of no valid objection to treating this as a part payment of the consideration which was to pass from the plaintiff to the defendants at a time prior to the passing of the title of the hay to plaintiff. This being so, there has been a payment by the plaintiff and a receipt by the defendants of a part of the consideration. It was the hay in its improved form as baled hay, which according to the theory of the defendants, was to pass from the defendants to the plaintiff, and if this be accepted as true, which it doubtless is, it cannot be successfully contended that the defendants have not received the value of services performed by the plaintiff in pursuance of this contract.

Suppose this agreement had been on the part of the plaintiff to pay a stated price for this hay when baled and delivered, and at the same time to thresh defendants' oats on the farm. The contract would not be materially different. In the one case, as in the other, plaintiff is performing a service for defendants which increases the value of their property. It is not necessary that the payment made upon the contract be in money. See Kuhns v. Gates, 92 Ind. 66; Howe v. Jones, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; McLure v. Sherman (C. C.) 70 Fed. 190.

Defendants rely upon Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088; Terney v. Doten, 70 Cal. 399, 11 Pac. 743; Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575, and Hudnut v. Weir, 100 Ind. 501, which was again before the court as Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24.

The case of Corbett v. Wolford is claimed to be controlling. In that case, however, while the facts are somewhat similar to the case under consideration, the question of whether the baling of the hay was a part payment was not under consideration at all. The case dealt with the sole question as to whether there had been in fact any delivery and acceptance which would take the transaction out of the statute of frauds.

The case of Terney v. Doten arose under a statute which rendered invalid all sales of personal property or agreement to buy or sell unless there was a note or memorandum in writing, or an acceptance by the buyer at the time of sale paid as part of the price. In that case defendant agreed to sell plaintiff 100 unbroken horses at the price of $75 each. The defendant was to gather up a number of horses from the band from time to time and place them in corrals from which plaintiff was to select not less than 20 and commence rough breaking them, having for that purpose the use of defendant's harness, cart, etc., after which the number so selected and broken were to be turned into defendant's pasture field and another selection made in a like manner and for a like purpose, and so on until the whole number agreed upon had been bought and sold. Under the contract, the plaintiff later on went to defendant's ranch, got together a number of horses, from which plaintiff selected 22 and commenced breaking them, upon the conclusion of which he turned them into the pasture field of defendant and waited for defendant to gather another lot. It was held that none of the horses forming the subject-matter of the contract ever passed into the absolute control and possession of the plaintiff, and that there was no acceptance and receipt of any of them by the plaintiff within the meaning of the statute.

The question whether there had been payment to the defendant by the plaintiff upon the contract was not involved, as it obviously could not have been urged on plaintiff's behalf, for the reason that there was no pretense that any payment was made at the time of the sale, which is the requirement of the California statute. It is needless to repeat that our statute contains no such requirement.

The cases of Galbraith v. Holmes and Hudnut v. Weir are very similar in their facts. In Galbraith v. Holmes it appeared that plaintiff made an agreement with the defendant by the terms of which defendant was to ship him flour to apply upon an indebtedness owing from defendant to plaintiff. Plaintiff also agreed to deliver to defendant his own sacks in which to put the flour and return to the plaintiff. In the case of Hudnut v. Weir, the arrangement was very similar except that the purchaser agreed as a part of the consideration of the sale, to furnish the bags in which to put corn when shelled, but it was said, and very properly, that the delivery of the sacks to the seller was a matter for the purchaser's own accommodation and was not part payment, and that therefore this did not take the transaction out of the statute. But in Weir v. Hudnut, the averment of the declaration being that the use of the sacks was to be treated as part consideration for the purchase of the property, the court held that this stated a case.

It will be noted that in these cases there was no passing of the title of the sacks from the purchaser to the seller. In the present case, any work done upon the hay in baling the same, passed a present benefit from the purchaser to the seller, and as it was done in pursuance of the contract, it could be nothing else than payment upon the contract. None of these cases, therefore, militate against the conclusion which we announce, that this contract was validated by the receipt of the benefit of baling the hay in pursuance of the contract.

None of the other questions presented call for discussion, as they relate to the other feature of the case. For instance, it is contended that the rule of damages was improper if the case is rested upon the view that the title to the hay had passed from defendants to the plaintiff. It does not lie with the defendants to urge that the title had passed by delivery and receipt. They have repudiated that view of the case, and, having refused to perform on their part, the plaintiff's remedy under the contract, as an executory contract, would seem to be complete and properly applied in this case. See Davis v. Strobridge, 44 Mich. 157, 6 N. W. 205.

The judgment is affirmed.

## KROHN v. BANTZ.

(Supreme Court of Indiana, 1879. 68 Ind. 277.)

WORDEN, J.[30] Complaint by Bantz against Krohn as follows:

"Noah Bantz complains of John Krohn, defendant, and says, that heretofore, on the 15th day of July, 1874, he contracted with and bought of defendant two hundred and fifty head of hogs, said hogs to average three hundred pounds gross, and none to weigh less than two hundred and fifty pounds, to be delivered at the town of Albany in Delaware county, Indiana, from the 1st to the 15th of December, 1874, at and for the price of four and $^{75}/_{100}$ dollars for each one hundred pounds of the gross weight of said hogs as aforesaid; and further, that there were not to be among said hogs any stag hogs or sows with pig; and as an earnest to bind said contract, and as part of the purchase-money of and for said hogs under said contract, plaintiff at the time and place of making said contract, executed and delivered his promissory note for one hundred dollars to defendant, due in thirty days from the day of date thereof, and drawing ten per cent. interest from date, and defendant accepted and received said note aforesaid as earnest upon said contract.

"Plaintiff says that he was at the town of Albany aforesaid during the whole of each day from and including the 1st day of December up to and including the 15th day of December, 1874, ready and willing to receive said hogs, and so notified the defendant, and demanded said hogs of defendant.

"Plaintiff avers that defendant wholly failed and refused, and still does fail and refuse, to deliver said hogs to plaintiff, as under said contract he was in duty bound to do. Plaintiff says, by reason of defendant's failure and refusal to deliver said hogs as aforesaid, he has been damaged three thousand dollars, which amount, and every part thereof, is due and wholly unpaid. Wherefore," etc.

A demurrer to the complaint for want of sufficient facts was filed and overruled. Exception.

Such further proceedings were had in the cause as that final judgment was rendered for the plaintiff.

Error is assigned upon the ruling on the demurrer. * * *

We now proceed to inquire whether the giving of the note, as alleged in the complaint, was sufficient to take the case out of the statute, for there is no pretence that the purchaser received any part of the property.

It may be observed that the note is not an agreement for the sale of the hogs, and can not be construed as a sufficient "note or memorandum in writing" of that bargain, within the meaning of the statute. Besides, it was not signed by the party sought to be charged in the action.

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[30] Part of the opinion is omitted.

The note, we think, can not be regarded as part payment within the meaning of the statute. It was but the plaintiff's agreement to pay, in the future, a part of the purchase-money for the hogs, before the arrival of the time for their delivery. It was no more effective for the purpose of taking the contract out of the statute, as part payment, than would have been the plaintiff's parol promise to do the same thing.

Had the note been of such a character as to be governed by the law merchant, and therefore to legally operate, prima facie, as payment, the question presented might have been different. But it was not shown that the note was such as to be governed by the law merchant. A debtor's promissory note, not governed by the law merchant, does not legally operate as payment of the debt; but it may be made to operate by the express agreement of the parties. Maxwell v. Day, 45 Ind. 509; Alford v. Baker, 53 Ind. 279.

It is not averred in the complaint that there was any express agreement between the parties that the note should be received as part payment for the hogs. But, if there had been, it would seem to be quite doubtful whether such an agreement would make the note operate as part payment within the statute. It would be but an agreement that a promise of future part payment should operate as part payment, while the statute requires something more than words; it requires part payment, and not a promise of part payment to be received as payment. See, on this point, Brabin v. Hyde, 32 N. Y. 519; Artcher v. Zeh, 5 Hill (N. Y.) 200; Mattice v. Allen, *42 N. Y. 492; Matthiessen, etc., Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Walrath v. Richie, 5 Lans. (N. Y.) 362; Walker v. Nussey, 16 M. & W. 602; Ireland v. Johnson, 28 How. Prac. (N. Y.) 463.

We come to the inquiry whether the note can be regarded as earnest, sufficient to bind the bargain, and are clearly of the opinion that it can not.

It was said in the case of Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306, that "as used in the statute of frauds, 'earnest' is regarded as a part payment of the price." But, conceding that it may be something distinct from part payment, it is quite clear that it must have some value. Browne, Stat. of Frauds, § 341; Benjamin, Sales, § 189, and note c.

The note was of no value whatever, because it had no consideration to support it, and its payment could not therefore have been enforced. To say that such a note has value, is but grasping at a shadow and losing sight of the substance. The contract for the sale of the hogs not being valid, the note given in consideration of the agreement therefor was based upon no valid consideration. That the note was void for want of consideration, is sustained by the following authorities; Combs v. Bateman, 10 Barb. (N. Y.) 573; Hooker v. Knab, 26 Wis. 511. See, also, the case of Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311. Indeed, the application to the question of a general principle of law is all that is necessary in order to dispose of it. The promise of one party may be a good consideration for the promise of the other. But if the promise of one is not valid and binding, because not made in accordance with the requirements of law, it can furnish no valid consideration for the promise of the other. The element of mutuality is entirely lacking in such case.

For these reasons we conclude that the complaint did not state facts sufficient to constitute a cause of action, and that the demurrer should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.[31]

## WALKER v. NUSSEY.

(Court of Exchequer, 1847. 16 Mees. & W. 302.)

Debt for goods sold and delivered, and on an account stated. Pleas,—1st, never indebted; 2d, a set-off for goods sold and delivered, and on an account stated. Issues thereon. At the trial, before the under-sheriff of Yorkshire, it appeared that, the defendant having sold goods to the plaintiff to the amount of £4 14s. 11d., the defendant, on a subsequent occasion, bought of him a lot of leather, of two sorts, by sample. It was then verbally agreed between them, that the £4 14s. 11d. due to the defendant should go in part payment by him to the plaintiff for the leather. Next day the plaintiff sent in the goods to the defendant, with this invoice:

"Halifax, Oct. 14, 1846.

"Mr. William Nussey, bought of Thomas Walker.

| | £ | s. | d. |
|---|---|---|---|
| Dressed hide bellies, 287, at 9d. | 10 | 15 | 3 |
| Insole, 376, at 6½ | 10 | 3 | 8 |
| | 20 | 18 | 11 |
| By your account against me | 4 | 14 | 11" |

The defendant returned the goods within two days as inferior to sample, and wrote to the plaintiff to pay him the £4 14s. 11d. The plaintiff refused to receive the goods, and brought this action, stating, in his particulars of demand, that the action was brought to recover the sum of £16 4s., as the "balance of the following account," (setting out the above invoice.)

The under-sheriff ruled, that there was nothing to show that the £4 14s. 11d. had been given by the defendant in earnest, or part of payment, under 29 Car. II, c. 3, s. 17, and left nothing to the jury, except on the point of acceptance of the goods by the defendant, directing them to find for him if they thought he returned the goods in a reasonable time, without taking to them. The jury found a verdict for the defendant on both issues.

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[31] Compare Ireland v. Johnson, 18 Abb. Prac. (N. Y.) 392 (1865), and Logan v. Carroll, 72 Mo. App. 613 (1897).

Pollock, C. B. I think no rule ought to be granted. The plaintiff sues for goods sold and delivered by him, to the defendant, above £10 in value, and it was admitted that the defendant had previously sold him goods for £4 14s. 11d. On the new dealing between them the agreement was, that that sum should be taken as part payment by the defendant, and that he should only pay the plaintiff the difference between that sum and the amount of the goods bought from him. This contract was verbal; but it is argued that the £4 14s. 11d. was a part payment by the defendant, so as to take the case out of the Statute of Frauds. But I think it was not. Here there was nothing but one contract, whereas the statute requires a contract, and, if it be not in writing, something besides. The question here is, whether what took place amounted to a giving of earnest or in part of payment at the time of the bargain, the goods bought by the defendant not having been then delivered to him by the plaintiff. Nothing turns on the effect of their subsequent delivery. Had these parties positively agreed to extinguish the debt of £4 odd, and receive the plaintiff's goods pro tanto instead of it, the law might have been satisfied, without the ceremony of paying it to the defendant, and repaying it by him. But the actual contract did not amount to that, and there has been no part payment within the statute.

Parke, B. I am of the same opinion, and think the ruling at the trial was right. The facts seem to be these. The plaintiff owed the defendant a sum of £4 14s. 11d. The parties then verbally agreed that the plaintiff should sell to the defendant goods above £10 in value, according to a given sample, the plaintiff's debt to go in part payment, and the residue to be paid by the defendant. No evidence was given of the actual payment or discharge of the debt due from the plaintiff, so that all rested in the agreement merely. If Mr. Addison could have shown the contract to have been, that the parties were to be put in the same situation at that time, as if the plaintiff's debt to the defendant had then been paid, or as if it had been paid to the defendant, and repaid by him to the plaintiff as earnest, the statute might have been satisfied, without any money having passed in fact; but the agreement was in fact, that the goods should be delivered by the plaintiff by way of satisfaction of the debt previously due from him to the defendant, and that the defendant should pay for the rest. Then the buyer did not "give something in earnest to bind the bargain, or in part of payment." The "part payment" mentioned in the statute must take place either at or subsequent to the time when the bargain was made. Had there been a bargain to sell the leather at a certain price, and subsequently an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff; either might have been an equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest, or in part of payment, then or subsequently.

Rule refused.[32]

## MILOS v. COVACEVICH.

(Supreme Court of Oregon. 1901. 40 Or. 239, 66 Pac. 914.)

This is an action to recover $225 for the breach of a contract to deliver a fishing net. The facts, as disclosed by the pleadings and testimony on behalf of the plaintiff, are, in substance, that on March 28, 1898, the plaintiff and defendant had an accounting and settlement as to the balance then due plaintiff for labor and services theretofore performed for the defendant as a result of which it was orally agreed that the defendant should, in payment of such balance, deed to the plaintiff a certain lot in Portland, of the estimated value of $500, pay him $100 in money upon the happening of a certain contingency, and deliver to him a fishing net, of the alleged value of $225, at the close of the fishing season, and plaintiff agreed to receive and accept such property in full settlement thereof. On March 30th the defendant, in pursuance of this agreement, conveyed to the plaintiff, by warranty deed, the lot referred to, and received a receipt, of which the following is a copy:

"Portland, Or., March 30th, 1898.

"Received of Peter Covacevich warranty deed to lot of 50x100 feet on Division and Thirty-Second streets, the said conveyance being in full payment of all labor and services rendered by me for the said Covacevich, with the understanding that I am to receive an additional one hundred dollars when the remainder of the four (4) acre tract owned by the said Covacevich on Division street is sold.

"[Signed] Mark Milos."

"Witness: J. E. D. Smith."

The defendant refused to deliver the net, and this action was brought to recover its value. At the close of plaintiff's testimony the defendant moved for a nonsuit on the ground that the contract was within the statute of frauds, and void. The motion was overruled, and plaintiff had judgment, from which the defendant appeals.

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[32] Concurring opinions were delivered by Alderson and Platt, BB.

BEAN, C. J. (after stating the facts). The agreement of the defendant to deliver the fishing net to the plaintiff in part payment of the balance due him for services was a contract for the sale of personal property within the statute of frauds, and void, unless the agreement of the plaintiff to accept the same in part payment and satisfaction of his indebtedness is to be deemed a payment within the meaning of the statute. Section 785, Hill's Ann. Laws, provides that an agreement for the sale of personal property at a price not less than $50, unless the buyer accept and receive some part of such property, or pay at the time some part of the purchase money, is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged.

It is quite well settled that an oral agreement to deliver goods exceeding $50 in value in payment of an antecedent debt is within such statute, and the mere oral agreement of the creditor that the goods shall go in settlement of the debt is not sufficient to satisfy its requirement. Unless the contract is in writing, the statute requires something more than mere words, however carefully they may be considered. There must be acts which, in the nature of things, are less open to misconstruction and misunderstanding. If payment is relied on, it must be made in money or property, or in the actual discharge, in whole or in part, of some antecedent debt. A mere agreement to apply the purchase money on the debt will not suffice, because the contract would still rest in words, and nothing more. There must be an actual cancellation and discharge of the indebtedness on the books of the creditor, or a written receipt executed by him, or some other like unequivocal act, not resting in mere words, which will bind him, and put it into the power of the debtor to enforce the contract.

Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536, is a good illustration of the rule. The contract there under consideration was an agreement by the defendant to sell to the plaintiff certain goods in payment of his indebtedness, the property in them to pass to the purchaser immediately. No note or memorandum of the contract was made or signed, but it was contended that the requirements of the statute of frauds had been complied with by payment of the contract price. As stated by the court, the question presented for decision was "whether an agreement in parol by the seller to sell and the buyer to buy goods to the value of an existing debt, and thereby satisfy and pay the debt, is a valid sale within the statute, though there be no delivery of the goods, and no receipt or voucher be given as evidence of the discharge of the indebtedness."

After a reference to the authorities, and especially to Walker v. Nussey, 16 Mees. & W. 302, which it is said has been adopted without dissent in the text-books (Benj. Sales, 139; Story, Sales, § 275a;

1 Chit. Cont. 564; 3 Pars. Cont. 52), the court, speaking through Mr. Justice Depue, says: "The principle which underlies the cases cited and on which they rest is that, where no written evidence of the contract is made, and payment is relied on as the compliance with the statute, mere words are not sufficient. Some act in part performance or part execution of the contract, such as the surrender or cancellation of the evidence of the debt, or a receipt or discharge of the indebtedness, is necessary to make the contract valid." To the same effect, see 1 Reed, St. Frauds, § 231; Browne, St. Frauds (4th Ed.) § 342a; Brabin v. Hyde, 32 N. Y. 519; Gorman v. Brossard, 120 Mich. 611, 79 N. W. 903; Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825.

This doctrine is admitted by the plaintiff, but his contention is that the receipt executed by him two days after the alleged agreement was a sufficient payment to take the cause out of the statute. The statute requires the payment to be made at the time of the agreement, and it is doubtful whether a subsequent payment will suffice, unless it is made for the express purpose of complying with the statute, or at a time when the parties substantially restated or reaffirmed the terms of the contract.[33] 1 Reed, St. Frauds, §§ 226, 227. But, however this may be, if the receipt is to be considered as evidence of the contract for any purpose it seems to us there is no evading the conclusion that it must be held to embody all the terms thereof. A mere receipt is always open to explanation, and may be varied by parol, because it is simply an admission or declaration in writing; but, where it also embodies the elements of a contract, the latter is subject to the same rules as any other contract. 19 Am. & Eng. Enc. Law, 1123, and notes; Conant v. Kimball's Estate, 95 Wis. 550, 70 N. W. 74; Jackson v. Ely, 57 Ohio St. 450, 49 N. E. 792; James v. Bligh, 11 Allen (Mass.) 4; Egleston v. Knickerbacker, 6 Barb. (N. Y.) 458; Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Goodwin v. Goodwin, 59 N. H. 548.

By the writing in question, binding on the plaintiff by his signature and on the defendant by its acceptance, it is, in effect, agreed that the execution and delivery of the deed and the subsequent payment of the $100 is a full satisfaction and discharge of the defendant's indebtedness. To permit the plaintiff to show by parol that he was to receive the fishing net in addition to the items specified in the writing would, it seems to us, clearly be permission to add to or vary the writing, and therefore incompetent. From these views it follows that, if the case is to be considered independently of the writing, on the theory that it was not intended to express the terms of the contract, the plaintiff must fail because of the statute of frauds. If, on the other hand, the writing is to be deemed evidence of the contract for one purpose, it must be for all, and he must fail because of the incompetency of evidence to vary or contradict the writing.

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[33] In a number of other states the statute expressly requires the payment to be made "at the time of the contract," and it has frequently been held that under such a statute a subsequent payment will not suffice, unless accompanied by a restatement or recognition of the essential terms of the contract. See Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65 (1886); Williston, Sales, § 99.

In either view, the judgment must be reversed, and it is so ordered.

## SECTION 6.—THE NOTE OR MEMORANDUM

### MERRITT & MERRITT v. CLASON.

(Supreme Court of New York, 1815. 12 Johns. 102, 7 Am. Dec. 286.)

This was an action of assumpsit, tried at the New York sittings, in April last, before Mr. Justice Yates.

John Townsend, a witness for the plaintiffs, testified, that he was a broker, and was employed by the defendant to purchase rye. On the 18th of February, 1812, he applied to Isaac Wright & Son, the agents of the plaintiffs in New York, and agreed to purchase of them 10,000 bushels of rye, at one dollar per bushel, and they authorized him to sell the same to the defendant, on the terms agreed on; the witness informed the defendant of the terms of sale, and was directed by him to make the purchase accordingly. The witness then went to Wright & Son, and closed the bargain with them, as agents of the plaintiffs, and in their presence wrote in his memorandum book, with a lead pencil, as follows: "February 18th, bought of Daniel & Isaac Merritt, (the plaintiffs,) by Isaac Wright & Son, 10,000 bushels of good merchantable rye, at one dollar per bushel, deliverable in the last ten or twelve days of April next, along side any vessel or wharf the purchaser may direct, for Isaac Clason, of New York, payable on delivery." All the other memoranda in the same book were written with a lead pencil. Soon after the purchase was thus completed, the witness informed the defendant of it, but did not give him a copy of the memorandum.[34]

Platt, J. The only point is, whether the memorandum, made by John Townsend, was a sufficient memorandum of the contract, within the statute of frauds, to bind the defendant.

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[34] Part of the statement of facts is omitted.

It is objected by the defendant's counsel,

1. That the memorandum is not "in writing," being made with a lead pencil only.

2. That it is not "signed" by the defendant, nor by his agent.

3. That it is not binding on the defendant, because his agent did not furnish him with a copy of it.

I have no doubt that the memorandum required by the statute, may as well be written with a lead pencil as with a pen and ink; and it is observable that in most of the reported cases on this head, the memoranda were written with a lead pencil, and no counsel, until now, has ever raised that objection.

I think it clear, also, from the authorities, that this memorandum was signed according to the statute.

It is not disputed, that the authorization of the agent, for such purpose, need not be in writing. In the body of this memorandum the name of Isaac Clason, the defendant, is written by his agent, whom he had expressly authorized to make this contract. The memorandum, therefore, is equally binding on the defendant as if he had written it with his own hand; and if he had used his own hand, instead of the hand of his agent, the law is well settled, that it is immaterial, in such a case, whether the name is written at the top, or in the body, or at the bottom of the memorandum. It is equally a signing within the statute. Saunderson v. Jackson and Another, 2 Bos. & Pull. 237; 1 Esp. 199; 1 P. Wms. 770, note 1.

The third objection is absurd. If the defendant's agent neglected his duty, in not furnishing his employer with a copy of this memorandum, it certainly cannot affect the rights of the plaintiffs, under that agreement.

The memorandum states, with reasonable certainty, every essential part of the agreement. The Court are of opinion, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.[35]

## SELBY v. SELBY.

(High Court of Chancery, 1817. 3 Mer. 2.)

The bill was for payment of the arrears of an annuity to which the plaintiff claimed to be entitled by virtue of an agreement entered into by his mother (since deceased) on the occasion of his marriage; which agreement was attempted to be inferred from letters written by her to the plaintiff upon that occasion. And, on the hearing, a question was raised, whether a letter addressed to the plaintiff, beginning "My dear Robert," (which was his Christian name,) and ending with the words, "Do me the justice to believe me the most affectionate of mothers," was sufficiently signed within the meaning of the statute, (2 Car. II, c. 3, s. 4,) although the name of the writer nowhere appeared in it.

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[35] Under statutes requiring the memorandum to be "subscribed," it is held that the signature must be at the end of the writing. Coon v. Rigden, 4 Colo. 275 (1878); Davis v. Shields, 26 Wend. (N. Y.) 341 (1841).

Sugden, for the plaintiff.

Before the statute, it was only necessary to prove the handwriting of the party to constitute a binding agreement; and all that the statute requires is, that there should be a signature; that the agreement, in order to be binding, "shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It nowhere says that the signature so required is the signing of the name of the party sought to be bound by it. Not more is required to constitute the validity of a deed than of a will, in which case it is decided that the testator's putting his name at the commencement is equivalent to his signing it; and yet the statute expressly requires a signature. See 1 Bro. C. C. 410; Sugd. Vend. & Purch. 76, 77, and cases cited. The statute requires signing, not subscribing, and therefore the mark of one unable to write is a sufficient signature. It was once a question whether sealing is not signing. Shepp. Touchst. 60, c. 4, No. 5.

A letter written in the third person, or in the name of the office and not of the individual, would be a sufficient compliance with the terms of the statute. "The Lord Chancellor agrees to do so and so" would bind Lord Eldon, then why not "the mother of Robert Selby;" and why not any other words by which the condition of the writer is clearly ascertained? The name may be printed or stamped instead of being written. The signature may be by initials only, and yet this would, in many instances, lead to the greatest uncertainty.

A letter not signed is sufficiently adopted by reference to it made in a subsequent instrument, and will, together with that instrument, constitute a sufficient agreement within the statute.

Bell for the defendant.

The words of the statute are positive, requiring nothing less than an actual signing to constitute the agreement. See Ithell v. Potter, cited in Hawkins v. Holmes, 1 P. Wms. 770, 771. It is not enough that the signature, or that which stands in the place of a signature, should identify the party. If so, the words "your affectionate mother" might be dispensed with, and proof of handwriting would be of itself sufficient. But all the cases say there must be the name of the party, or his mark in case he is incapable of writing his name, but even that mark must be identified by a subscribing witness. In Stokes v. Moore, 1 Cox, 219, 1 Cox's P. Wms. 771, note, the name was in the body of the instrument, and it was said, "the meaning of the statute is, that the signing should amount to an acknowledgment by the party that it is his agreement, and, if the name does not give such authenticity to the instrument, it does not amount to what the statute requires." And speaking of the cases of wills to which it had been compared, the Lord Chief Baron observes, "that those cases have been where the instrument importing to be the final instrument of the party has been formally attested, and is in its nature complete, and the only question has been, whether the form of the statute has been complied with." 1 Cox, 222, 3. And see Walker v. Walker in the Court of Delegates; Sugd. Vend. & Purch. 77, note, and ante, vol. 1, p. 503.

As to the case of an agreement established by reference to it made in a subsequent letter or instrument, the principle upon which it proceeds, shews that it is nothing to the present purpose. In Coles v. Trecothick, 9 Ves. 250, the Lord Chancellor says, "though the agreement is not signed, yet if the letter contains all the terms and describes the consideration and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, that letter, which not only is not a signature, but is the last of all things that can be called signing the agreement, is a writing signed; which, ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute."

Sugden, in reply.

If the mark of a marksman be considered as a sufficient compliance with the statute, it must be admitted to be in consequence of the principle for which I contend; namely, that it is enough to identify the writer, for the statute has no where said that a mark will do. A name printed or stamped has always been held sufficient, and that without any inquiry whether the party was or was not capable of writing his name.

The Master of the Rolls said, if he had apprehended at first, that this was the only letter applicable to the purpose of the plaintiff's demand, he should not have suffered the cause to go on; for it was impossible to hold that it could be taken to be sufficiently signed within the statute, unless it were by reference to some other instrument having a proper signature. That it is a very forced construction of the words of the statute to say that the use of the mere ordinary terms of ceremony constitutes a compliance with the regulations it prescribes. It is not enough that the party may be identified. He is required to sign. And, after you have completely identified, still the question remains, whether he has signed or not. There may be in the instrument a very sufficient description to answer the purpose of identification without a signing; that is, without the party having either put his name to it, or done some other act intended by him to be equivalent to the actual signature of the name—such as a person unable to write making his mark. But it was never said, because you may identify the writer, therefore there is a signature within the meaning of the statute. If so, the word "I" or "me" would be enough, provided you can prove the handwriting.

Bill dismissed.[36]

## MORIN v. MARTZ et al.

(Supreme Court of Minnesota, 1868. 13 Minn. 191 [Gil. 180].)

This action was brought in the Court of Common Pleas of Ramsey County, to recover damages for the non-performance of a contract for the sale and delivery of wheat. Issue was joined, and the cause tried before the court, without a jury, who found for the plaintiff, and judgment was entered in his favor. From this judgment defendant appeals to this court. As the only question discussed in this court was whether the contract was within the "statute of frauds," and the contract is set out, at length, in the opinion, no further statement is necessary.

BERRY, J.

"St. Paul, April 27, 1866.

"We, the undersigned parties, have sold this day to Mr. H. Morin, of St. Paul, four thousand (4,000) bushels of No. 1 wheat, at one dollar and ten cents per bushel, ($1.10,) to be delivered and shipped on board of boat at Strait Landing, two thousand (2,000) bushels to be shipped on or before the fifteenth (15th) day of March, 1866, and the balance to be shipped during the balance of said month.

"[Signed] Frank Martz.
"Michael Simmer."

This action is brought to recover damages for a failure to deliver and ship the wheat mentioned in the foregoing instrument according to the terms thereof. Section 3, c. 50, Pub. St., provides that "every contract for the sale of any goods, chattels, or things in action, for the price of $50, or more, shall be void, unless a note or memorandum of such contract be made in writing and subscribed by the parties to be charged therewith."

The defendants contend that the instrument above recited does not satisfy the requirements of the statute, because it is subscribed by the vendors only, and that the complaint is insufficient, because, although alleging that a memorandum of the contract of sale was made in writing, and duly subscribed by defendants, it does not allege that it was signed by all the parties to such contract. But the construction, which has quite uniformly been put upon the statute of frauds, is otherwise. In Clason v. Bailey, 14 Johns. (N. Y.) 487, Chancellor Kent says: "It is sufficient, if the agreement be signed by the party to be charged. It appears to me that this is the result of the weight of the authority both in the courts of law and equity." See also the opinion of Senator Verplanck, in Davis v. Shields, 26 Wend. (N. Y.) 362.

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[36] For criticisms of this decision, see Browne, Statute of Frauds, § 362; Williston, Sales, § 112, note 61.

A signature by the use of initials is sufficient. Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446, 14 L. Ed. 493 (1852). So is a signature consisting of the signer's first or Christian name only. Walker v. Walker, 175 Mass. 349, 56 N. E. 601 (1900).

The statute of frauds was enacted in the reign of Charles II, nearly 200 years since, and the same construction placed upon this portion of it by Chancellor Kent has been adopted with a remarkable approach to unanimity, not only in England, but in this country. Prof. Parsons says: "And it is now quite settled that the agreement need not be signed by both parties, but only by him who is to be charged by it." 3 Parsons, Cont. (5th Ed.) 9, and numerous authorities cited; Fenly v. Stewart, 5 Sandf. (N. Y.) 101; Old Colony R. Co. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Browne, St. Frauds, § 365; 1 Smith, Lead. Cas. 466. It will also appear, from the authorities cited, that the language, "who is to be charged by it," is held equivalent to the language, "who is to be charged by it in the suit," or "against whom it is sought to be enforced."

It is urged in this case that the use of the plural word "parties" is significant when read by the light of other portions of the same statute, in which the singular word "party" is made use of, and that it is fair to infer that the legislature intended to comprehend in the term "parties" all the parties to the contract. In Clason v. Bailey, 14 Johns. (N. Y.) 490, Chancellor Kent adverts to this point, saying: "There is a slight variation in the statute respecting agreements concerning the sale of lands, and agreements concerning the sale of chattels, inasmuch as the one section (being the fourth section of the English and the eleventh section of our statute) speaks of the party, and the other section (being the seventeenth of the English and the fifteenth of ours) speaks of the parties to be charged. But I do not find from the cases that this variation has produced any difference in the decisions. The construction as to the point under consideration has been uniformly the same in both cases."

It would seem, then, that by a strong and united current of authority, the signification of the words "parties to be charged therewith," or of words equivalent, in the statute of frauds, has been settled by adjudications reaching over a very long period of time. These words have acquired a meaning which it was not absolutely necessary to give them in the first instance; a meaning which has been frequently regretted by courts, but nevertheless a meaning settled and established by long usage. There is no practical, rational way of determining the meaning and definition of words and phrases, except by inquiring in what sense they are usually employed in the connection in which they are found. And following this course we are of opinion that the legislature must have intended to use and must have used the words "parties to be charged therewith" in the sense in which they have generally been used and understood in like cases.

We hold, therefore, that the subscribing of the note or memorandum of the contract in this case by the vendors alone was a sufficient subscription, under the statute, in an action brought against them.

Judgment affirmed.

## DRURY et al. v. YOUNG.

(Court of Appeals of Maryland, 1882. 58 Md. 546, 42 Am. Rep. 343.)

Action by William H. H. Young for non-delivery of twenty-five hundred cases of tomatoes. Verdict and judgment for the plaintiff. The defendants appealed.[37]

STONE, J. One of the questions presented for our consideration in this case is, whether the "note or memorandum in writing" required by the seventeenth section of the statute of frauds, must be delivered to the other party thereto. It is apparent from the evidence that the note or memorandum in writing relied on in this case, was made by the bookkeeper of the appellants by the direction of one of them, and by the bookkeeper placed in their safe, among other papers, where it remained from the 27th of August, 1881, the day on which it was written, until it was produced in court, at the trial of the case in February, 1882. There is no evidence that this note was ever seen by the appellee, or even its existence known to him until the trial; and it certainly never was delivered to him, or went out of the possession of the appellants, until produced in court.

It is strongly insisted by the appellants that the statute is not gratified without a delivery of this note or memorandum. It must be borne in mind that the statute of frauds was not enacted for cases where the parties have signed a written contract; for in these cases, the common law affords quite a sufficient guarantee against frauds and perjuries, as is provided by the statute. The intent of the statute was to prevent the enforcement of parol contracts, unless the defendant could be shown to have executed the alleged contract by partial performance, or unless his signature to some written note or memorandum of the bargain—not to the bargain itself, could be shown.

The existence of the note or memorandum presupposes an antecedent contract by parol, of which the writing is a note or memorandum. Benjamin on Sales, sec. 208.

Now the statute itself is entirely silent on the question of the delivery of the note or memorandum of the bargain, and its literal requirements are fulfilled by the existence of the note or memorandum of the bargain, signed by the party to be charged thereby. The statute itself deals exclusively with the existence and not with the custody of the paper.

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[37] Substituted statement. The facts sufficiently appear in the opinion. Part of the opinion is omitted.

If the non-delivery of the note, does not violate the letter of the statute, would it violate its spirit and be liable to any of the mischiefs which the statute was made to prevent?

The statute was passed to prevent fraud practiced through the instrumentality of perjury. It was passed to prevent the defendant from suffering loss, upon the parol testimony of either a perjured or mistaken witness, speaking of a bargain different from the one in fact made. It made the defendant only liable when a note or memorandum of the bargain signed by himself was produced at the trial.

If produced from the defendant's own custody, it guards against the mischief that the statute was passed to prevent, just as well as if produced from the custody of the plaintiff. The plaintiff is the one likely to suffer by leaving the evidence of his bargain in the hands of the defendant—not the defendant himself.

The statute of frauds is an English statute, and in the absence of any express adjudication of our own court, we naturally look to the English courts as the best expounders of their own statute, and gather from them the principles which should guide us in construing it.

In the case of Gibson v. Holland, 1 Law Reports, C. P. 1, the only note or memorandum of the bargain was a letter addressed by the defendant to his own agent; the court decided that to be sufficient, and Erle, C. J., in delivering his opinion, said:

"But the objection relied on is, that the note or memorandum of that contract, was a note passing between the defendant, the party sought to be charged, and his own agent, and not between the one contracting party and the other."

"The object of the statute of frauds, was the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view, it requires the contract to be proved, by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent. Indeed, one would incline to think that a statement made by the party to his own agent, would be the more satisfactory evidence of the two."

In Johnson v. Dodgson, 2 Meeson & Welsby, 653, the defendant made the note of the sale in his own book, and got the agent of the plaintiff to sign it, and the defendant retained the book in his own possession.

It was held by the court, that the note or memorandum was sufficient, and the plaintiff recovered. No notice appears to have been taken by the court in their opinion, of the fact that the memorandum had not been delivered, but had been retained possession of by the defendant. But in the argument of the case, counsel of defendant said: "Suppose the defendant had simply made a memorandum in his own book, that on such a day the plaintiff sold to him; would that be sufficient?" To which Parke, J., replied, "If he meant it to be a memorandum of a contract between the parties, it would."

From these authorities, and the reasons upon which they were decided, we are of opinion, that delivery is not essential to the validity of the note or memorandum of sale.

The next question which arises is, whether the note or memorandum in this case, is signed by the defendant? The note is in these words:

"Office of Drury, Ijams & Rankin, Wholesale and Retail Grocers, and Dealers in Flour, Feed and Fertilizers, Cor. Gay and High Streets. E. T. Drury, W. H. Ijams, Jr., S. M. Rankin, Jr. Baltimore, Aug. 27th, 1881. Sold W. H. H. Young & Co., 2,500 cans, say 5,000 doz. C. C. C. tomatoes, @ $1.10 pr. doz. cash; cars at Phila. Depot, Balto., Md. 5,000 dozen, @ $1.10c., $5,500.00." It appears that all the words, preceding the words, "Baltimore, August 27th, 1881," were printed, and that the printed part was a letter head, and the written portion under the heading. The names of the defendants being in print, and at the beginning of the note, the question is, whether it is a sufficient signing?

It is entirely immaterial in what part of the instrument the name of the party to be charged appears, if it is put there by him, or by his authority. Higdon v. Thomas, 1 Har. & G., 152.

This decision of our court settles the question that the place of the signature in the memorandum is immaterial, and the English cases are equally emphatic, that the name may as well be printed as written, if the printed name is adopted by the party to be charged.

In Schneider v. Norris, 2 Maule & Selwyn, 286, Lord Ellenborough decided, that the appropriation and recognition of a printed name was sufficient.

It is therefore a sufficient signing, if the name be in print, and in any part of the instrument, provided that the name is recognized and appropriated by the party to be his. The note or memorandum in this case upon its face, contains all the necessary terms of a complete bargain.

The names of the vendors and purchasers, the quantity and quality of the goods contracted for, the price at which they were sold, and the terms of sale, and the place of delivery, are all clearly expressed therein, and make a sufficiently good memorandum required by the statute. * * *

Judgment affirmed.

## BAILEY et al. v. SWEETING.

(Court of Common Pleas, 1861. 9 C. B. [N. S.] 843, 30 Law J. C. P. 150.)

ERLE, C. J. This was an action for goods sold and delivered. There was an oral contract for the sale and delivery of the goods in question; but the defendant relies upon the Statute of Frauds, and contends that there was no note or memorandum of the bargain in writing to satisfy that statute. After the making of the oral contract, however, there was a letter written by the vendee to the vendors, which contains this statement: "The goods selected for ready money was the chimney-glasses, amounting to £38. 10s. 6d." (the goods in dispute), "which goods I have never received, and have long since declined to have, for reasons made known to you at the time,"—the reason being, that, in consequence of the negligence of the carrier through whom they were sent, the goods were damaged. Now, the first part of that letter is unquestionably a note or memorandum of the bargain; it contains a description of the articles sold, the price for which they were sold, and all the substantial parts of the contract. If it had stopped there, there could be no dispute as to its being a sufficient note or memorandum to satisfy the statute.

It is clear that the note or memorandum may be made after the time at which the oral contract takes place; and, to my mind, that which passed orally between the parties on the subject of the bargain in July, was in the nature of an inchoate contract, and the subsequent letter had a retroactive effect, making the contract good and binding. The latter part of the defendant's letter in effect says, "I decline to take the goods because the carrier damaged them in their transit;" and it is contended on his part, that the acknowledgment at the beginning of the letter does not constitute a sufficient memorandum within the statute, because the latter part contains a repudiation of his liability,—relying much on the passage cited from my Brother Blackburn's book on the Contract of Sale, where it is suggested that a subsequent acknowledgment in writing has not the effect of making the contract good, if it is accompanied by a repudiation of the defendant's liability under it. A case is referred to, of Rondeau v. Wyatt, 2 H. Bl. 63, where an answer to a bill of discovery, in which the defendant admitted the agreement, was held not to preclude him from taking the objection that there was no note or memorandum to satisfy the Statute of Frauds.

We have adverted to the authorities cited in Mr. Justice Blackburn's book, and to the case of Rondeau v. Wyatt; but we find no decided authority upon the point in judgment. In that state of the authorities, we are remitted to the Statute of Frauds itself; and, upon reference to its language, we think the defendant's letter does amount to a sufficient memorandum in writing, and makes the contract good. The purpose of the statute was, to prevent fraud and perjury. Now, the danger of perjury in this case is effectually prevented by the letter of the defendant; for, he distinctly admits that he made the contract, and at the price alleged. I do not consider that the defendant intended to deny his liability by reason of the absence or insufficiency of the contract: but that the only question which he intended to raise, was, whether he or the plaintiffs should settle with the carriers for the damage done to the goods.

I think that constitutes a material distinction between the present case and those cited, in which the defendant, admitting the contract, has rested his defence on the non-compliance with the statute. But, if there be no such distinction, and we are called upon to consider whether the doctrine suggested in my Brother Blackburn's book correctly represents the law upon this subject, with the highest respect for that clear-headed and highly eminent judge, I must say that I am unable to give my assent to his proposition. I think the purpose of the Statute of Frauds is answered by the defendant's letter, and that the plaintiffs are entitled to recover.[38]

## NEWELL v. RADFORD.

(Court of Common Pleas, 1867. L. R. 3 C. P. 52.)

Declaration for non-delivery of 32 sacks of flour.

Plea, non-assumpsit.

The case was tried before Kelly, C. B., at Merionethshire summer assizes, when it was proved that the plaintiff was a baker, and the defendant a flour dealer, and that John Williams, a duly authorized agent of the defendant, had called on the plaintiff and solicited orders, and had made the following entry in one of the plaintiff's books:

"Mr. Newell, 32 sacks culasses at 39s., 280 lbs., to wait orders.
"June 8. John Williams."

The plaintiff subsequently gave orders for the delivery of part of the flour; but the defendant refused to deliver it. A correspondence was put in which had taken place subsequently to the purchase between the plaintiff and defendant respecting the delivery of the flour.

A verdict was found for the plaintiff for £20., and leave was reserved to the defendant to move to enter a nonsuit or a verdict, on the ground that there was no sufficient memorandum of the contract to satisfy the Statute of Frauds.

Bovill, C. J. In this case it is not disputed that the signature of the agent Williams would be sufficient to bind the defendant but it is contended that the written memorandum does not sufficiently shew which of the parties was the buyer. At first sight this, indeed, might not appear quite clear, except to a man in the trade; but it has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum, and that for this purpose parol evidence of the surrounding circumstances is admissible, and the cases of Macdonald v. Longbottom, 1 E. & E. 977, 28 L. J. (Q. B.) 293, in error 1 E. & E. 987, 29 L. J. (Q. B.) 256, and Spicer v. Cooper, 1 Q. B. 424, are authorities to that effect.

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[38] Concurring opinions were delivered by Williams, Willes, and Keating, JJ.

In this case it was shewn that the plaintiff was a baker, and that the defendant was a dealer in flour, which the plaintiff would require for his trade, and, looking at the nature of the entry in relation to those facts, I think there can be no reasonable doubt that it was a sale from the defendant to the plaintiff. If, however, there were any doubt, looking at the entry alone, it is set at rest by the two letters which passed between the plaintiff and defendant, which sufficiently identify the contract, and in which the relative positions of the parties as buyer and seller is distinctly stated.

WILLES, J. I am of the same opinion. If the case of Vandenbergh v. Spooner, Law Rep. 1 Ex. 316, had been in point, we should have granted a rule, and perhaps made it absolute, leaving the parties to take the opinion of the Court of Exchequer Chamber. I think, however, that case is distinguishable. I own I have considerable difficulty in understanding that case, but if I do so rightly it amounts to this, that a written agreement "A. agrees to buy B.'s horse for £10." is not sufficient to satisfy the Statute of Frauds, because it cannot be inferred by reasonable intendment that B. is the seller. I cannot help observing that that seems to be an extreme case.

The present, however, does not come within its authority, because here there was a regular entry by the defendant's agent in the plaintiff's book describing what was to be sold, and the defendant was proved to be a person who sold such goods, and the plaintiff a person who would require to purchase such goods for the purpose of his trade. Taking, therefore, the entry in connection with those circumstances, I think it sufficiently appears from it who was the buyer and who the seller of the goods. There was, moreover, a correspondence which seems to be sufficiently connected with the entry to be available, if necessary, and from which the relation of the parties as buyer and seller clearly appears.

Rule refused.[39]

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[39] Concurring opinions were delivered by Byles and Keating, JJ. Compare Frank v. Eltringham, 65 Miss. 281, 3 South. 655 (1888).

## HANSON v. MARSH.

(Supreme Court of Minnesota, 1888. 40 Minn. 1, 40 N. W. 841.)

Dickinson, J.[40] The principal ground of recovery, as set forth in the complaint, and as presented in the case, is the breach of an alleged contract for the sale to the plaintiff, by the defendant, of a threshing-machine, consisting of a separator and engine. The plaintiff had a verdict for damages. It will only be necessary, upon this appeal from an order denying a new trial, to decide as to the validity of the alleged contract with regard to the statute of frauds.

The following written instrument, signed by the defendant, is relied upon as a sufficient memorandum of the contract to answer the requirements of the statute:

"Glencoe, 20th May, 1887.

"I, John Marsh, having this day sold to Hans Hanson, of the town of Helen, county of McLeod, a certain threshing-machine (of the Agitator Separator manufacture, and a twelve-horse Minnesota Giant engine), and do by this writing agree to run with said Hans Hanson, (assisting him in the running of this machine,) for the term of one month, at the rate of two dollars per day. And I further bind myself not to purchase another machine for the term of two years, or to have anything to do with the running of any other machine. John Marsh."

It is alleged in the complaint, and further appears from the evidence in the case, that the price or consideration to be paid by the plaintiff, in performance of his part of the agreement, was $1,100. This may be taken to have been an entire price or consideration, both for the sale of the property and for the further obligation of the defendant, as expressed in the above written instrument. The plaintiff, however, alleges in his complaint that the value of the property agreed to be sold was $1,400, and that the value of the defendant's good-will and assistance in the business was $200. Deducting the latter sum from the whole contract price, it seems that, according to the estimate of the plaintiff, the sum which could be ascribed as the price of the property agreed to be sold was not less than $900.

The evidence, too, goes to show that the sale of the property was the principal subject of the transaction, to which the further agreement expressed in the memorandum was merely incident; and upon the whole case it cannot be doubted that of the whole stipulated price, $1,100, the greater part represented, in the contemplation of both parties, the price of the property agreed to be sold. Such being the case, the agreement involved a contract for the sale of chattels "for the price of fifty dollars or more," within the meaning of the statute, which requires a note or memorandum of such contract to be made in writing. Such a contract is within the statute; although it also embraces some other agreement to which the statute is not applicable. Harman v. Reeve, 18 C. B. 587; Irvine v. Stone, 6 Cush. (Mass.) 508. And see Hodgson v. Johnson, El., Bl. & El. 685, and Rand v. Mather, 11 Cush. (Mass.) 1, 59 Am. Dec. 131.

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[40] The statement of facts is omitted.

While it appears, both from the pleadings and from the evidence, that there was a definite stipulated price to be paid by the plaintiff, it will be observed that the memorandum contains no statement of or allusion to it. The price is an essential element in a contract of sale, and a memorandum which does not state the price,—unless, perhaps, in cases where, no price being stipulated, it is left to be measured by the rule of reasonable or market value,—is insufficient to satisfy the statute, and the contract is, by the terms of the statute, void. Elmore v. Kingscote, 5 Barn. & C. 583; Acebal v. Levy, 10 Bing. 376; Goodman v. Griffiths, 1 Hurl. & N. 574; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698; Waterman v. Meigs, 4 Cush. (Mass.) 497; Ashcroft v. Butterworth, 136 Mass. 511; Stone v. Browning, 68 N. Y. 598, 604; James v. Muir, 33 Mich. 223; Browne, St. Frauds, § 376; 1 Benj. Sales, p. 271, § 251; 2 Schouler, Pers. Prop. § 492.

Order reversed.

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## O'NEIL v. CRAIN.

(Supreme Court of Missouri, 1878. 67 Mo. 250.)

NORTON, J. This is a suit for the recovery of damages, growing out of an alleged breach of contract on the part of defendants, in refusing to receive and pay for three hundred and sixty hogs, claimed to have been sold to them by plaintiff. The answer denied the allegations of the petition, and interposed the statute of frauds, alleging that the contract was for the sale of personal property, and that there was no sufficient note or memorandum in writing of the same. Judgment was rendered for plaintiff, on the trial, from which, after timely motions for a new trial and arrest had been overruled, defendants have appealed to this court. A reversal of the judgment is sought on the ground that the court admitted illegal evidence.

During the progress of the trial, a witness, on behalf of plaintiff, was permitted to detail the statements made to him by one Black, in regard to the reason why Blossom, one of the defendants, would not receive and pay for the hogs, which plaintiff offered to deliver under his contract. This evidence was objected to, on the ground that it was mere hearsay. This objection, we think, should have been sustained, and the evidence rejected. Black was not a party to the suit, nor were the statements given in evidence, made either in the presence of Blossom or any other of the defendants. The evidence elicited from this witness was material, inasmuch as it showed an admission, on the part of Blossom, that he did not refuse the hogs because they were not such as plaintiff had agreed to deliver him, but because the price had gone down since he had contracted for them.

It is also argued that the written memorandum of the contract, offered in evidence, was not sufficient to take the case from the operation of the statute of frauds, and that parol evidence could not be received to supply any of its terms. Parol evidence is clearly inadmissible to contradict, alter, or vary a written contract, but when a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part of it only is reduced to writing, the matter thus omitted may be supplied by parol evidence. Rollins v. Claybrook, 22 Mo. 407; Moss v. Green, 41 Mo. 389; Briggs v. Munchon, 56 Mo. 467; 1 Greenl. Ev. § 284a. The memorandum offered in evidence, was as follows:

"Brookfield, September 10, 1874.

"William O'Neil: You will please get us 360 hogs instead of 250, if you can, so as to make three car loads at your place. Be careful about the weights. I. I. Crain, Bro. & Co."

The memorandum is silent as to the price to be paid, and does not purport to express the entire contract, and the evidence offered to explain it, in this particular, being in no wise contradictory to the writing, was, under the authorities cited, properly admitted. Because of the reception of illegal evidence as hereinbefore indicated, the judgment will be reversed and the cause remanded.

Reversed.[41]

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## KRIETE v. THOMAS J. MYER & CO.

(Court of Appeals of Maryland, 1883. 61 Md. 558.)

STONE, J.[42] Waidner & Co., as agent for Kriete, the appellant, sold to Myer & Co., the appellees, a quantity of canned fruit. The following is the memorandum of sale:

"Baltimore, May 12, 1882.

"Sold to Mess. T. J. Myer & Co. for account of E. W. Kriete, one thousand (1000) cans 3 lbs. Standard Peaches, half yellow, next season's packing, at 1.80 per doz., 60 days, or less 1½ per cent. off for cash from date of delivery; said peaches to be fully equal to his last season's packing.

"[Signed] H. A. Waidner & Co."

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[41] For a further discussion of the question of price, see Williston, Sales, § 103.

[42] Part of the opinion is omitted.

Kriete refused to deliver the goods, and upon suit brought against him set up the following as his principal defence to the action:

That the written note or memorandum of the sale differed from the parol contract in this: that the parol agreement fixed a special date, (October 5, 1881,) on or before which the goods were to be delivered, and that the written note or memorandum, having omitted such special date, was faulty, and that no recovery could be therefore had upon it. This is the contention of the appellant.

On the other hand the appellees insist that no time for the delivery of the goods was specified or mentioned in the parol agreement and none mentioned in the note or memorandum, and that the memorandum of the sale is amply sufficient to satisfy the requirements of the Statute of Frauds.

It was conceded in the argument of this case, that, if the written note required by the Statute, contained all the substantial agreement made by parol, the note or memorandum was a sufficient agreement. But whether it is conceded or not such is clearly the law.

It is not necessary to the validity of such an agreement that the time of the delivery should be stated. If no time is stated for the delivery of the goods sold, then the law will imply that it is the duty of the seller to deliver them in a reasonable time; and what is a reasonable time must depend upon the circumstances surrounding the case, and the nature of the article dealt in. Or if there is an established custom among merchants who deal in the particular goods sold, regulating the time of such delivery, the delivery will be controlled and regulated by such custom. 2 Benjamin on Sales, 891; Williams, etc., v. Woods, Bridges & Co., 16 Md. 220; Salmon Falls Manu. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493.

We have then in the note or memorandum before us, all the stipulations necessary for a complete contract of sale, and which would certainly be sufficient to entitle the appellees to recover on provided that the note or memorandum omitted no stipulation contained in the verbal agreement of the bargain itself. The memorandum required by the statute not being in itself the sale, but only a memorandum of it. In addition to the written memorandum, the appellees offered the evidence both of Waidner and Shryver, who made the verbal agreement, that nothing whatever was said in such agreement about the time of delivery, and which evidence tended to prove that there was no variance between the verbal bargain and the written note thereof.

But the appellant having offered evidence tending, as he claims, to show that there was a stipulation in the parol agreement for a special time for the delivery of the goods, to wit, on or before the 5th of October, 1881, or in the months of August or September, 1881, and that such stipulation not being in the written memorandum, asked the Court to instruct the jury that if they found such to be the fact, the appellees could not recover. This instruction the Court gave, and in giving it, the Court gave the appellant the benefit of all the law that he asked for in this branch of his case, and all that he was entitled to.

The first three prayers of the defendant each present this question of fact to be decided by the jury, and the Court told the jury most emphatically and in various forms of expression, that if they did find that in the verbal agreement on or before the 5th of October, 1881, or in August or September, 1881, was the time fixed for delivery, that then the appellees were not entitled to recover, as that date was not included in the written memorandum. This was the whole contention of the appellant, and the jury could not possibly mistake the instructions of the Court on that point granted at the request of the appellant. * * *

The prayer of the plaintiffs marked one and a half should not however have been granted. That prayer instructed the jury that if they found that the verbal agreement did fix a time for delivery, that if that time was the same time fixed by the general and uniform usage in the trade of such goods, that then it was immaterial whether such time was specified in the written memorandum or not.

This was an error. It was not necessary, as we have already said, that any time of delivery should be mentioned in the written memorandum, provided no verbal agreement was made as to delivery, as in such case the law would fix the time. But if a time was fixed in the bargain itself, it must be incorporated in the note. 1 Benjamin on Sales, 277.

But it has been repeatedly held by this Court that not only must an instruction be erroneous, but that the appellant must be prejudiced thereby before it can be made the ground of reversal. The cases of Young v. Mertens, 27 Md. 114, and Parker v. Wallis, 60 Md. 15, 45 Am. Rep. 703, are among a number of cases on this point.

Taking all the instructions granted, and all the evidence in the case before us, we cannot perceive that the verdict of the jury could have in any wise depended upon, or was influenced by the erroneous instruction. * * *

Judgment affirmed.[43]

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[43] Compare Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352 (1882), in which the court said: "And when a memorandum is made and signed, and delivered between the parties as and for a complete memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties, and parol evidence is incompetent to contradict or vary its terms or construction; and if in fact some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them."

## NORTH & CO. v. MENDEL & BRO.

(Supreme Court of Georgia, 1884. 73 Ga. 400, 54 Am. Rep. 879.)

Hall, J. The plaintiffs brought suits against M. Mendel & Bro., a firm composed of Meyer Mendel and Joseph Mendel, upon an account for five boxes pork bellies, 124 pieces, 2,817 pounds, at 8 cents, $225.36, sent from Boston on the 17th of January, 1884 to Savannah, per steamship City of Columbus. The goods were sent upon the order of George C. Freeman, who was alleged by the plaintiffs to be a broker, but who was regarded by the defendants as the plaintiffs' agent, and dealt with by them, according to their evidence, in the latter character. This shipment was made upon a telegram, sent from Savannah to Boston, on the 16th day of January, 1884, by George C. Freeman to plaintiffs, which was as follows:

"Mendel five bellies, eight. Ehrlich offers seven-eights ten bellies lighter than last."

In Freeman's entry book, under this date, the following appears, as was proved in his own handwriting: "Sold account C. H. North & Co., Mendel, 5 bellies, 8."

This telegram, together with the entry, was the only note or memorandum in writing of the contract sued on. The steamship, shortly after sailing, was wrecked, and her cargo was lost. The goods never reached the defendants. Under the evidence in the case, the jury found for the defendants, and a motion made for a new trial was overruled. On the judgment overruling this motion, error is assigned.

The defence set up was that the suit was upon a contract for the sale of goods amounting to fifty dollars and more; that the defendants never accepted and received any part of the same; gave nothing in earnest or part payment to bind the bargain; and that the promise was not in writing and signed by them, nor by any person authorized by them to do so. Code, § 1950, subsec. 7. It is conceded that if Freeman did not act as a broker in the transaction, and if the word "Mendel" in his entry book is not the signature of defendants, which he was authorized to make, and if the delivery of the goods on board the vessel consigned to them, was not an acceptance and delivery of the same to them, then they are not liable under this section of the Code, and their defence must prevail. The verdict seems, for these reasons, to have been sustained by the lower court, the evidence on both points being conflicting.

The testimony of the defendants, which the jury had a right to credit, showed that they did not then, and had never dealt with Freeman as a broker, but had always dealt with him as the agent of the plaintiffs, and had never given him authority to sign their names to that or any other promise in writing; that Freeman came to them on the occasion in question, as he had usually done on former occasions, soliciting orders for the plaintiffs, as whose agent they regarded and treated with him. On the other point, they showed that they dealt with the plaintiffs for cash, and, according to their usual course of dealing, goods ordered were never considered as belonging to them until delivered at their place of business and paid for.

The plaintiffs' evidence tended, rather inferentially than directly, to rebut both these positions, so that, if there were nothing else in the case, we could not say that there was not evidence to sustain the verdict, and that the judge did not exercise a sound discretion in refusing to set it aside and to grant a new trial.

Admitting that the last of these points is with the defendants, then the plaintiffs insist that Freeman was a broker; that he ordinarily acted in that, and in no other, character; and that defendants knew this, and must have dealt with him in that capacity, and have given him authority to bind them by signing their names to a promise in writing, which he did by this entry in his book; that while it is true their names were not subscribed by Freeman to the entry, still, if it appeared anywhere in the same, that was sufficient to bind them. Much extraneous evidence was offered and received, over the objection of defendants, to explain and render intelligible both this cabalistic entry and telegram. To the introduction of this the defendants objected, and their objection being overruled, they filed exceptions to the decision, and have brought it here for review.

We are of opinion that this memorandum, taken either by itself or in connection with the telegram, does not satisfy the requirements of the statute; without such evidence, it would be impossible to connect these papers as forming parts of the memorandum of the agreement relied on. The statute does not require that all the terms of the contract should be agreed to or written down at one and the same time, nor on one piece of paper; but where the memorandum of the bargain is found on separate pieces of paper, and where these papers contain the whole bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the signed paper make such reference to the other written paper or papers as to enable the court to construe the whole of them together as containing all the terms of the bargain. If, however, it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain, so as to satisfy the statute. 1 Benjamin on Sales, § 220, and note 24. Smith v. Jones, 66 Ga. 338, 42 Am. Rep. 72, is upon this question, directly in point.

But supposing the entry and telegram to be united by the internal evidence furnished by themselves, then they would not satisfy the statute, because they fail to show what property was contracted for, what price was agreed upon, and the parties to whom it was sold. "Sold account of C. H. North & Co., Mendel, 5 bellies 8," as expressed in the entry, or as expressed in the telegram, "Mendel, five bellies, eight; Ehrlich offers seven-eights, ten bellies lighter than last," contain matter not only ambiguous, but unintelligible to any one but Freeman and the plaintiffs, without explanation, or rather translation, by a resort to parol evidence, and this was the very thing the statute was enacted to prevent, in order to take away all temptation to commit either fraud or perjury. 1 Benj. § 210, and citations in note (l) and 7 there; Id. §§ 233, 236, 247, 249–252, inclusive. By reason of these deficiencies, this alleged contract was imperfect, and could only be made perfect by a resort to parol testimony, which was incompetent for such a purpose. Smith v. Jones, supra. "Mendel," of itself and unaided by other evidence, could not be taken as the firm name of the defendants, while "5 bellies, 8" is, to the last degree, enigmatical, if not wholly unintelligible.

Waiving any question as to the commodity sold, both the quantity and the price are wholly indefinite; in these respects there is no ambiguity, either latent or patent, which, in any case, could be explained by a resort to parol evidence, but the uncertainty is great and manifest, and it has not been shown that the terms employed here are in accordance with any mercantile usage or custom in reference to which the contract was made. The contract is therefore faulty in failing to set out the purchaser, the quantity and price of the article sold; these are all essential ingredients, and should have appeared, as we have seen, in the memorandum of the bargain.

It was remarked shortly after the passage of the act of 29 Car. II, for the prevention of frauds and perjuries, from which our law is taken, with the modifications since made therein by the interpretation of the courts and judges, by a venerable and distinguished judge, that every line of that celebrated statute was worth a subsidy to the people of England, and many learned and able administrators of the law have expressed regret that the force and efficiency of this act have been impaired by the least departure fom its plain provisions, and by construing it so as to introduce exceptions not authorized by its letter. Some of these exceptions are embodied in our Code, and, so far as they are there recognized, we have no power to reject them; but we will not add others by construction, to avoid what may appear to be either harsh or inconvenient.

We repeat, with all the emphasis that the unanimous judgment of this bench can give to it, what was said by the present chief justice in pronouncing the judgment of the court in Smith v. Jones, supra, that "the rule should not be relaxed now, when the flood-gates are open wide as to the competency of witnesses, and the only breakwater left is to put this class of contracts, and others of similar character, in writing." The case in hand falls under no exception recognized by our law, and the testimony objected to on the trial by the defendants should have been repelled. Without it there was nothing to rest a verdict on in favor of the plaintiffs. Whether the result of the trial was attained by proper methods, it is sufficient that the verdict is necessarily correct, and the court was right in allowing it to stand.

Judgment affirmed.

## BIBB v. ALLEN.

(Supreme Court of United States, 1893. 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.)

The defendants in error, citizens of the states of New York and Tennessee, and doing business in the city of New York as brokers, commission merchants, and cotton factors, under the firm name and style of Richard H. Allen & Co., brought this action of assumpsit in February, 1887, against the plaintiff in error and one Hopkins, citizens of Alabama, as partners under the name of B. S. Bibb & Co., to recover the sum of $20,023.50 with interest, which was claimed as commissions for services rendered, and money paid and advanced by them for and at the request of the defendants in selling, for their account, and as their agents, cotton for future delivery, according to the rules and regulations of the New York Cotton Exchange, in the city of New York.[44] * * *

Mr. Justice Jackson (after stating the facts as above). * * * It is next urged on behalf of the plaintiff in error that the contracts for the sale of the cotton were void under the statute of frauds of the state of New York, because there was no sufficient note or memorandum in writing of the transactions, signed by the parties to be charged thereby. We are of opinion that this contention cannot be sustained under the facts of the case.

After agreeing upon the terms in which the business should be transacted, and the use of Shepperson's code of cipher, B. S. Bibb & Co., on November 9, 10, and 11, 1886, telegraphed orders to the plaintiffs to sell for them in the aggregate 10,000 bales of cotton for January and February delivery. These dispatches were sent according to the form of Shepperson's code, and directed the sales for delivery for account of designated names such as "Albert," "Alfred," "Alexander," "Amanda," "Andrew," "Winston," etc., which names were intended and understood to represent the firm name of B. S. Bibb & Co. Thus, under date of November 9, 1886, B. S. Bibb & Co. telegraphed to plaintiffs: "If bureau report is considered favorable to-morrow sell for January delivery 1,000 bales cotton account Albert. Sell for February delivery 1,000 bales account Alfred. Sell for January delivery 1,000 bales account Alexander. Sell for January delivery 500 bales cotton account Andrew. Act promptly if favorable." So, under date of November 10, 1886, they telegraphed: "If market opens as high or higher to-morrow sell for January delivery 1,500 bales cotton account Winston. Keep us thoroughly posted."

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[44] Part of the statement of facts and part of the opinion are omitted.

These dispatches, as well as others of a similar character of later dates, meant "sell for January or February delivery the designated number of bales on account of B. S. Bibb & Company," and had attached to them, by the express terms of Shepperson's code, the understanding and agreement, already quoted, that the orders were to be subject in every respect to the by-laws and rules of the cotton exchange of New York, with the additional terms read into the telegrams, and as a part thereof, the stipulation that the sales were to be subject to said by-laws and rules in reference to the future delivery of cotton.

The plaintiffs executed these orders promptly as they were received. In the execution of the orders they made what are called "slip contracts" in duplicate, one copy, signed by the purchaser, being delivered to the plaintiffs, and the other, signed by the plaintiffs as brokers, being given to the purchaser. There were 19 sales of cotton to various persons named in these "slip contracts," which were in the following form:

New York, Nov. 10, 1886.

'B. 10, ac. Albert.
10 " Alexander.
5 " Andrew.
Seller, ——— ———.
Buyer, Zerega & White.
On contract, subject to rules and regulations of New York Cotton Exchange.
Twenty-five hundred bales cotton.
Jan. 1 delivery.
Price, 8.99.
x Per Z. & White, seventy-five."

These contracts differed only in date, in the name of the purchaser, in the quantity of cotton sold, and the price thereof. As each sale was thus made, it was reported promptly by the plaintiffs to the defendants, both by letter and by telegram, giving price, and stating that the orders to sell were executed. So that the defendants were kept accurately advised of each transaction made in pursuance of their order.

In addition to the "slip contracts" in the form described above delivered by the plaintiffs to the purchasers of the cotton sold, and received by them from the buyers of cotton, the sales were entered upon the books of the plaintiffs in conformity with such contracts. These "slip contracts" show upon their face that the purchaser named therein bought cotton, sold for account of the name adopted to represent B. S. Bibb & Co. They gave the price, and the number of bales, and the time of delivery. They were in the form prescribed by the rules and regulations of the cotton exchange, and constitute bought and sold notes, which, taken together, as they should be, constitute a sufficient memorandum in writing of the contract between the brokers, or their principal, and the purchasers of the cotton, to meet the requirements of the statute of frauds. Peabody v. Speyers, 56 N. Y. 230, 236, 237; Newberry v. Wall, 84 N. Y. 576, 580; Butler v. Thomson, 92 U. S. 412, 23 L. Ed. 684; Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496; Ryan v. U. S., 136 U. S. 68, 83, 10 Sup. Ct. 913, 34 L. Ed. 447; Bayne v. Wiggins, 139 U. S. 210, 11 Sup. Ct. 521, 35 L. Ed. 144.

In this latter case this court, speaking by Mr. Justice Harlan, said: "The principle is well established that a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract." So in Benjamin on Sales, (Amer. Ed. § 296,) after a review of the authorities, both English and American, it is stated: "The bought and sold notes, when they correspond and state all of the terms of the bargain, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's books, or, what is equivalent, only an unsigned entry." Goom v. Aflalo, 6 Barn. & C. 117; Sievewright v. Archibald, 17 Q. B. 104, 115; Thompson v. Gardiner, 1 C. P. Div. 777. Such, too, is the rule in New York, as shown by the earlier cases of Peltier v. Collins, 3 Wend. 459, 20 Am. Dec. 711; Davis v. Shields, 26 Wend. 341.

The bought and sold notes in question in this case, called "slip contracts," when read in the light of the rules and regulations of the cotton exchange, and considered in connection with the letters and telegrams between the parties, constitute a sufficient note or memorandum in writing of the transactions to satisfy the requirements of the statute of frauds. It is no valid objection to these "slip contracts," executed in duplicate, that the sales purported to be made on account of "Albert," "Alfred," "Alexander," "Amanda," and "Winston," etc., which names were adopted by the defendants, and which represented them and their account. Parol evidence was clearly competent to show that these fictitious names, which defendants had adopted, represented them as the parties for whose account the sales were made. * * *

## NEW ENGLAND DRESSED MEAT & WOOL CO. v. STANDARD WORSTED CO.

(Supreme Judicial Court of Massachusetts. Suffolk, 1896. 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.)

Contract, to recover the price of 5,014 pounds of "F C wool," alleged to have been sold by the plaintiff to the defendant. The answer, among other defences, set up the statute of frauds. At the trial in the Superior Court, before Mason, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

KNOWLTON, J.[45] * * * The defendant contended that there was no sufficient memorandum of the contract as required by the statute of frauds.[46] It is immaterial that the defendant's name appears in the body of the memorandum instead of as a signature at the end of it and that the name was written by the defendant's agent and broker instead of by one of its officers. Hawkins v. Chace, 19 Pick. 502; Coddington v. Goddard, 16 Gray, 436; Clason v. Bailey, 14 Johns. (N. Y.) 484; Tourret v. Cripps, 48 Law J. Ch. (N. S.) 567.

The quantity given in the statement of the goods to be manufactured is merely an estimate, or at most a limitation, and the language creates no uncertainty in regard to the manufactured goods. Brawley v. U. S., 96 U. S. 168–172, 24 L. Ed. 622. The most doubtful question arising on the memorandum is whether the words, "about 2,000 to 2,500 lbs. F. C." taken in connection with the words following, "and all they make for thirty days," etc., is a sufficient designation of the property sold. The rule is that the goods sold must be designated in the writing, and cannot be shown by parol. May v. Ward, 134 Mass. 127; Waterman v. Meigs, 4 Cush. 497; Pulse v. Miller, 81 Ind. 190; Holmes v. Evans, 48 Miss. 247, 12 Am. Rep. 372; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37. But we have no doubt that the meaning of the letters "F. C.," which are technical abbreviations used in the wool trade, may be shown by parol, as well when they appear in a memorandum relied on under the statute of frauds as in any other writing.

While parol evidence is not competent to contradict or vary the terms of such a memorandum to show what is intended, we are of opinion that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown to apply the contract to the subject-matter. Upon this point the decision in Macdonald v. Longbottom, 1 El. & El. 987, which was concurred in by all the judges sitting in the exchequer chamber, is an authority which fully covers the present case. When it is shown who and where the parties were at the time of making the contract, and what property the plaintiff had on hand of the kind described, it is clear, without more, that the memorandum referred to the 2,443 pounds of wool on hand, recently manufactured, and to the additional amount which might be manufactured within the 30 days. See Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; Hurley v. Brown, 98 Mass. 545, 96 Am. Dec. 671; Scanlan v. Geddes, 112 Mass. 15; Slater v. Smith, 117 Mass. 96; Nichols v. Johnson, 10 Conn. 192; Waring v. Ayres, 40 N. Y. 357; Colerick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505. * * *

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[45] Part of the opinion is omitted.

[46] The memorandum, which was made by one Pratt, was as follows: "Mar. 24/93. Bought of New Eng D M & W Co about 2000 to 2500 lbs F C and all they make for thirty days say up to 10,000 to 15,000 lbs at 40 cts. net cash 1 % brokerage to me for % Standard Worsted Co."

## HIGGINS et al. v. SENIOR.

(Court of Exchequer, 1841. 8 Mees. & W. 834.)

Argued before Parke, Alderson, Gurney, and Rolfe, BB.

Parke, B.[47] The question in this case, which was argued before us in the course of the last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of non assumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts, at the time when the agreement was made and signed. Upon consideration, we think that it was not: and that the rule for a new trial must be discharged.

There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to (Garrett v. Handley, 4 B. & Cr. 664; Bateman v. Phillips, 15 East, 272), and charge with liability on the other (Paterson v. Gandasequi, 15 East, 62), the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. * * *

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[47] The statement of facts and part of the opinion are omitted.

## JOHNSON & MILLER v. BUCK.

(Supreme Court of New Jersey, 1872. 35 N. J. Law 338, 10 Am. Rep. 243.)

DEPUE, J. * * * [48] In sales of real, as well as personal property, the auctioneer, as between the vendor and purchaser, is the agent of both parties. In an action by either against the other, the signature of the defendant's name made by the auctioneer at the time of the sale, is a sufficient signing within the statute. Emerson v. Helis, 2 Taunt. 38; White v. Procter, 4 Taunt. 209; Mews v. Carr, 1 H. & N. 484; Kennys v. Procter, 3 V. & Beames 57; McComb v. Wright, 4 Johns. Ch. (N. Y.) 659; First Baptist Church v. Bigelow, 16 Wend. (N. Y.) 28; Davis v. Rowell, 2 Pick. (Mass.) 64, 13 Am. Dec. 398; Morton v. Dean, 13 Metc. (Mass.) 385.

The agent, to make the signature, must be some third person. Neither of the contracting parties can be agent for the other. A signature by the vendor or purchaser, of the name of the other, is not a sufficient signing. Wright v. Dannah, 2 Camp. 203; Raynor v. Lithorn, 2 C. & P. 120; Sharman v. Brandt, L. R. 6 Q. B. 720; Bent v. Copp, 9 Gray (Mass.) 397, 69 Am. Dec. 295. Where the suit is brought by the auctioneer himself, for the purposes of that suit, he is regarded as a contracting party, and a signing by him of the name of the defendant is insufficient. Fairbrother v. Simons, 5 B. & Ald. 333. But the reason of this disqualification to be the agent of the purchaser, for the purpose of signing, does not apply to the clerk of the auctioneer. When the bids are announced, and the property struck off, the clerk is the agent of both parties to record the sales and affix the signature of the purchasers, although he is employed to act as clerk by the auctioneer. No reason for his disability to act as agent for the purpose of making the signature of the purchaser, as between the latter and the auctioneer, can be adduced, which will not operate equally to exclude the auctioneer, where the litigation is directly between the vendor and purchaser.

The question, in every case, is one of fact, whether the person by whom the signature has been made was an agent lawfully authorized to make the same. Auctioneers and brokers, by virtue of their business, by the usages of trade, are assumed to have such authority; and where the auctioneer's clerk, or a volunteer, acts openly at a sale in entering the successful bids as they are publicly announced, his authority to act for the purchaser in the premises is established. Consequently, it has been held that, in a suit in the name of an auctioneer against a purchaser to recover the price of the goods, the signing of the purchaser's name by the clerk of the auctioneer, upon the successful bid being announced, is a sufficient signing within the statute. Bird v. Boulter, 4 B. & Ad. 443; Browne on Frauds, § 369; Durrell v. Evans, 1 H. & C. 174–188; Gill v. Bicknell, 2 Cush. (Mass.) 358. * * *

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[48] The statement of facts and part of the opinion are omitted.

## GRANT et al. v. FLETCHER et al.

(Court of King's Bench. 1826. 5 Barn. & C. 436.)

Assumpsit for not accepting four hundred bags of Egyptian cotton pursuant to contract. Plea, general issue. At the trial before Hullock, Baron, at the last Spring assizes for the county of Lancaster, the following appeared to be the facts of the case. The plaintiffs having received advices, that six hundred bags of cotton were shipped for them at Alexandria, by the ship Robert, of which one Wake, was master, directed their broker, Withington, to sell four hundred bags at 17¾d. per lb. Withington, accordingly entered into a verbal contract with the defendants, and made the following entry of it in his memorandum book: "Sold Peter Fletcher & Son, four hundred Egyptians, to arrive per Robert, Wake, at 17¾d. per lb." And he delivered to the defendants the following note of the contract: "Robert, Wake, four hundred bags of Egyptian cotton at 17¾d., shipped on the 22d of February, for Wm. Grant, and Brothers.—Henry Withington." On the same day he delivered to the plaintiffs the following note: "four hundred certain to Messrs. Fletcher & Son, at 17¾d., ten days and three months from the delivery, you allowing me my commission, H. W." It was objected, that as the notes delivered to the contracting parties were different, neither was bound, and Cumming v. Roebuck, Holt's N. P. C. 172, was cited. The learned Judge was of opinion, that there was no valid contract binding both parties, and the plaintiff was nonsuited.

Abbott, C. J. The broker is the agent of both parties, and, as such, may bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the same contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers a different note of the contract to each of the contracting parties, there is no valid contract. The entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it. A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed: but if the notes are imperfect, as in the present case, an unsigned entry in the book will not supply the defect. It is the duty of brokers to make the contract so as to be binding on both parties. They are employed to prepare contracts on which great sums of money depend, and I must say, that in many cases which have come before me they appear to conduct their business in a very slovenly, negligent manner.

Rule refused.

## PARTON v. CROFTS.

(Court of Common Pleas, 1864. 16 C. B. [N. S.] 11, 33 Law J. C. P. 189.)

Erle, C. J.[49] I am of opinion that the decision of the judge of the county court was right. This was an action by a seller against a buyer for not accepting goods sold. It is clear from the statement of facts submitted to us, that the brokers were employed by both buyer and seller,—by the seller to sell, and by the buyer to buy for him; that the terms were arranged by them as the common agents for both parties, and were communicated to them. The question which we have to decide, is, whether the requirements of the Statute of Frauds have been complied with by the memorandum in writing which was produced. I make a distinction between the contract and the memorandum of the contract: The latter may be made long after the terms have been agreed to; and the making of the one is entirely distinct from the other. That which the plaintiff here produced, was, a memorandum signed by the brokers, who were agents for both parties, that the iron had been sold on a given day upon certain terms.

Mr. Quain insists that the delivery of the sold-note to the buyer is not according to the usual course; and that the only evidence of the contract is the bought and sold-notes, not the note which was produced. I am, however, of opinion that the objection is unfounded, and that the memorandum which was produced is a complete memorandum of the contract, containing the quantity, quality, price, and time and mode of payment. It is said that the sale-note does not contain the terms of a purchase. But it is impossible that there can be a sale without a purchase: the relation of buyer and seller can only exist where there are two parties to the bargain. It is impossible to say that the document in question is not a memorandum that the defendant contracted to buy the iron therein described. If, instead of being signed by the agents, it had been signed by the defendant himself, could it have been contended for a moment that it was not a sufficient memorandum of the contract to satisfy the Statute of Frauds? In Sievewright v. Archibald, 17 Q. B. 103, the bought and sold-notes differed, and so the evidence of the contract failed. Here, the sold-note only was produced, and there was nothing to

[49] The statement of facts is omitted.

impeach it. That distinguishes the two cases. To satisfy the 17th section of the statute it is enough to produce a memorandum of the contract signed by the party to be charged thereby, or by an agent thereunto duly authorized. I think the county court judge came to a right conclusion.

WILLES, J. I am of the same opinion. When it is found that the brokers were the agents of both parties, it is the same as if the signature had been in the handwriting of the principal himself. As to the other point made by Mr. Quain, though a point which could not have arisen but for the Statute of Frauds, it is not one to be decided upon the statute. It is said that the bought and sold-notes together constitute the contract between the parties, and that both should be produced. If in ordinary practice these expressed different things, I should agree with Mr. Quain that both must be produced. But it is well known that in practice the one is a copy of the other. It is the duty of the common agent of both buyer and seller (where one broker only is employed) to send each a copy: and, in the absence of evidence to the contrary, it is not too much to assume that the agent has done his duty.

For these reasons, I am disposed to agree with what was done by Lord Denman upon the first trial of the case of Hawes v. Forster, 1 M. & Rob. 368, where, one of the notes only having been put in, he assumed that to be a true representation of the contract between the parties. And, when I read the judgment of Patteson, J., in Sievewright v. Archibald, and recollect the accuracy of language ordinarily used by that very learned judge, I cannot doubt that in his opinion the contract would have been well proved by the production of one of the notes, in the absence of proof that the other contained different terms. The judgment must be affirmed, and with costs.

Judgment affirmed.[50]

## JONES BROTHERS v. JOYNER.

(Queen's Bench Division, 1900. 82 Law T. [N. S.] 768.)

This was an appeal from his Honour Judge Sir Richard Harington, sitting at the Worcester County Court.

The plaintiffs were hop growers and the defendant was a publican, and the action was brought to recover the price of two pockets of hops, and at the trial an alternative claim was added for damages for the refusal of the defendant to accept the hops.

On the 22d April, 1899, the defendant gave the plaintiffs the order and signed the following memorandum:

"April 22.—Mr. J. P. Joyner, Worcester.—2 Pos. of Hops 1898, at *7l.* 5s. per cwt., awaiting order. Cash on delivery.

"J. P. Joyner."

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[50] A concurring opinion was delivered by Williams, J.

The above memorandum was made by the plaintiffs in a paper memorandum or note book in which orders were generally put, and it was signed by the defendant.

This paper book was slipped into a leather cover, upon which the name "James Jones" was stamped. When the paper memorandum book was full, it could be withdrawn and a fresh one inserted in the same leather cover.

It was contended by the defendant that there was no sufficient memorandum to satisfy the Sale of Goods Act 1893, s. 4, as the plaintiffs' name, did not appear in the memorandum signed by the defendant.

It was contended by the plaintiffs that the name being on the cover of the case in which the memorandum book was at the time the order was taken was sufficient to satisfy the statute, and the book and case were sufficiently connected to make the name on the case part of the memorandum, on the authority of Sarl v. Bourdillon, 1 C. B. (N. S.) 188, 2 Jur. (N. S.) 1208.

The learned judge distinguished that case on the ground that there the name of the plaintiff was on the fly-leaf of the book itself, and he gave judgment for the defendant, holding that the cover and the book were two distinct articles.

The plaintiffs appealed.

Darling, J. The plaintiffs in this case, Jones Brothers, are sellers of hops, and this book belonged to one of the partners. He sold certain hops to the defendant, and made the note in his book which was signed by the defendant. It is now objected that there was not sufficient memorandum to satisfy the Statute of Frauds, reenacted by section 4 of the Sale of Goods Act 1893, where the names of the buyer and seller must both appear. The learned County Court judge has held that there was not a sufficient memorandum to satisfy the statute, and he made reference in his judgment to the two cases of Sarl v. Bourdillon, 1 C. B. (N. S.) 188, 2 Jur. (N. S.) 1208, and Vandenberg v. Spooner, 14 L. T. Rep. 701, L. Rep. 1 Ex. 316.

That latter case has little to do with the matter, for the name Vandenberg had only to do with identifying the goods. In Sarl v. Bourdillon the note made had been signed by the buyer, and the name of the seller was on the fly-leaf of the book itself. The learned judge in his judgment says: "In Sarl v. Bourdillon evidence that the entry was signed by the defendant in plaintiff's order book containing the name of the plaintiff on the fly-leaf was held sufficient. But there the book was an order book, and appears to have been an entire document as much as a deed engrossed on several skins of parchment attached together would be. Here the cover and the book were two distinct articles, and the name was evidently printed on the case as an indication of ownership of it and its contents, whatever they might happen to be, and not for the purpose of indicating concurrence in contracts." He seems to think that if this had all been an order book it might have been sufficient; but although this book was a pocket book, it was one in which there were orders, and in which orders were written.

In Champion v. Plummer, 1 Bos. & P. 252, it was held that a note or memorandum in writing, signed by the seller only and without anything on the memorandum to show who the buyer was, was not a sufficient memorandum to satisfy the statute. In the course of the report it says that it was proved that a note was made in a common memorandum book and signed by the defendant. No point is made in the judgment that this was merely a common memorandum book, and I do not mention this point for the first time, for in Allen v. Bennet, 3 Taunt. 169, Sir James Mansfield, C. J., says: "To be sure this case at first sight comes near to the case of Champion v. Plummer, and the objection there certainly was that the memorandum was not signed by the purchaser; that was a note made in what the report calls a common memorandum book; this book certainly was not like what I at first apprehended it to be, until it was produced; for I at first thought this had been an order book. * * *" However, in Champion v. Plummer the court did not take the point that it was only a common memorandum book. But the case which is most like the present is undoubtedly Sarl v. Bourdillon, supra, where the book is described as an order book.

The other point that the learned County Court judge took was that the book and cover were two distinct articles. But when the memorandum was made they were only one. Take the case of a letter and envelope. First of all the letter is written, it is placed in an envelope, and the name of the other person appears on the envelope. In such a case there may be two distinct articles, which are used as one. Further, I think it makes no difference that the words "order book" do not appear. In fact, the orders were placed in a book which was used for that purpose. The appeal must be allowed.

Bucknill, J. From a common-sense point of view one cannot say that there were two distinct articles. In fact there was only one article. I come to the same conclusion as my Brother, that this appeal must be allowed.

Appeal allowed.

## BREWER v. HORST & LACHMUND CO.

(Supreme Court of California, 1900. 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240.)

Gray, C. This is an action for a breach of contract of sale and purchase brought by vendor against the vendee. The complaint sets out an agreement whereby plaintiff agreed to sell, and defendant agreed to buy of plaintiff, 57,110 pounds of hops, at 11⅝ cents per pound; that plaintiff tendered the hops, and defendant refused to take or pay for them; and that thereupon plaintiff sold said hops to a third person for the best obtainable price, which was $830.93 less than defendant had agreed to pay therefor. Plaintiff obtained judgment for said $830.93, and defendant appeals. The case comes here on the judgment roll.

The answer sets up the statute of frauds, alleging that the agreement sued on "was an agreement for the sale of goods and chattels at a price exceeding two hundred dollars; and defendant did not accept or receive any part of said goods and chattels, and did not pay any part of the purchase money therefor; and said sale was not made at auction; and said agreement was not, nor was any sufficient, proper, or adequate memorandum or note thereof, in writing, subscribed by defendant or by any agent of defendant."

The court found as to the contract:

That Fred E. Alter was the general agent in the state of California, and was empowered to make contracts therein for defendant. That C. A. Wagner was defendant's agent in the county of Sacramento, empowered to solicit samples in that and adjoining counties from hop growers, and transmit the same to defendant's said general agent at Santa Rosa, California, "and to contract with such growers for the purchase from them in behalf of defendant corporation of such of said hops as might by the latter be desired, subject to the approval of the defendant corporation, through its general agent, said Alter." That plaintiff was a hop grower having a farm near Ben Ali, Sacramento county, and in September, 1897, said Wagner, as agent for defendant, obtained samples of a certain lot of hops, consisting of 296 bales, weighing 57,110 pounds, belonging to said plaintiff, and transmitted said samples to Alter at Santa Rosa, at the same time informing said Alter of the fact that said samples were from the lot aforesaid, comprising 296 bales of the last pickings of hops grown by plaintiff during the year 1897 upon his said farm. That at the same time said Wagner designated said samples by the trade number or symbol "13." That it was and is the custom which prevails generally among dealers in hops to mark and designate by number the different samples furnished them by growers, and such custom was followed by defendant in the transaction herein set forth. That hops are sold, according to the custom of trade and usage in California, by the pound. That on October 11, 1897, plaintiff and defendant's agent, Wagner, entered into an oral contract, subject to the approval of Alter whereby plaintiff sold and defendant bought the aforesaid lot of hops, provided the same were in quality equal to the samples marked "13," and it was agreed that defendant should inspect the hops on or before October 16th. On the same day, October 11th, Wagner telegraphed to Santa Rosa as follows:

"October 11, 1897

"Horst & Lachmund Co., Santa Rosa, Cal.: Bought thirteen, at eleven five-eighths net you; confirm purchase by wire to Brewer, nineteen sixteen M street. Inspection on or before Saturday. Do you want fifteen at eleven quarter? C. A. Wagner."

Alter received this message the same day, and thereupon sent to plaintiff, and plaintiff received, the following telegram:

"Santa Rosa, Cala., Oct. 11, '97.

"Geo. Brewer 1916 M street, Sacramento, Cali.: We confirm purchase Wagner eleven five-eight cents, like sample.

"[Signed] Horst and Lachmund Co."

That these telegrams are the only written evidence of the contract between the parties. That the said Alter knew that the number or symbol designated "13," used in the telegram first set out above, referred to and meant the hops belonging to plaintiff, as aforesaid comprising said 296 bales or thereabouts and were the past pickings of plaintiff's hops grown upon his said farm in 1897, and also knew the situation of the hops and the other facts hereinbefore mentioned. And that defendant subsequently inspected the hops, and, without any lawful or just cause, rejected them and refused to receive them when tendered by plaintiff.

The only question presented for decision is, did these telegrams constitute a sufficient note or memorandum of the contract to satisfy the requirements of the statute of frauds? The trial court, by its judgment, answered this question in the affirmative. And, in view of all the facts found, we think the court reached the proper conclusion. If there were nothing to look to but the telegrams, the court might find it difficult, if not impossible, to determine the nature of the contract, or that any contract was entered into between the parties. But the court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all the circumstances under which it was made; and if, when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was and what were its terms, then the court should not hesitate to hold the memorandum sufficient.

Oral evidence may be received to show in what sense figures or abbreviations were used, and their meaning may be explained as it was understood between the parties. Mann v. Higgins, 83 Cal. 66, 23 Pac. 206; Berry v. Kowalsky, 95 Cal. 134, 30 Pac. 202, 29 Am. St. Rep. 101; Callahan v. Stanley, 57 Cal. 476. Also: "Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject-matter, and to explain all terms and phrases used in a local or special sense." Preble v. Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301; Towle v. Coal Co., 99 Cal. 397, 33 Pac. 1126.

Interpreting the telegrams by the foregoing rules, it is not difficult to see that the parties to the contract are George Brewer, of 1916 M street, Sacramento, California, vendor, and the Horst-Lachmund Company of Santa Rosa, California, vendee; that the contract was one of purchase and sale, and the subject of it was the property represented in the first telegram by "13," and well known by the parties to consist of 296 bales of hops and to be the last pickings of hops grown by plaintiff upon his farm in Sacramento county during the year 1897; and that the price to be paid for said hops was 11⅝ cents per pound. The two telegrams bear the same date. On their face, the last one was sent to plaintiff in response to the first; and it is clear that they should be read together, to determine whether they constitute the note or memorandum required by the statute of frauds. Elbert v. Gas Co., 97 Cal. 244, 32 Pac. 9; Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179. We are satisfied that the telegrams, thus read by the light of the circumstances surrounding the parties, are sufficient to take the contract out of the statute of frauds. Any other conclusion than the one here reached would certainly impair the usefulness of modern appliances to modern business, tend to hamper trade, and increase the expense thereof.

We advise that the judgment be affirmed.

We concur: Haynes, C.; Chipman, C.

For the reasons given in the foregoing opinion, the judgment is affirmed.

## BECKWITH v. TALBOT.

(Supreme Court of United States, 1877. 95 U. S. 289. 24 L. Ed. 496.)

Mr. Justice Bradley.[51] This was an action brought by Talbot against George C. Beckwith in the District Court of Colorado for the County of Fremont, to recover damages for the breach of a contract alleged to have been made on the 7th of October, 1870, between the plaintiff and two others on the one part, and the defendant on the other, whereby they were to herd and care for a large herd of cattle for the defendant, from that time until the fifth day of December, 1872, for which he was to give them one-half of what the cattle and their increase should then bring over, $36,681.60; that is, to each one-third of such half. The declaration alleged that the plaintiff and the two persons who entered into the contract together with him (who were the sons of the defendant) performed their part of it, but that the defendant refused to sell the cattle, or to pay the plaintiff his share of their value above the said sum.

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[51] Part of the opinion is omitted.

On the trial, two defences were relied on which are made the subject of assignments of error here: First, that the alleged contract was void by the Statute of Frauds, because, though not to be performed within a year, it was not in writing signed by the defendant; secondly, that it was a joint contract on which the plaintiff could not maintain a separate action.

The territorial Statute of Frauds declares that "every agreement which by its terms is not to be performed within a year, unless some note or memorandum thereof be in writing and subscribed by the party chargeable therewith, shall be void." The verbal difference between this statute and that of Charles II. is not material in this case.

It appeared on the trial that the agreement made by the parties was committed to writing at the defendant's instance, and was in the following words, to wit:

"Wet Mountain Valley, Oct. 7, 1870.

"This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at $36,681.60 on shares from George C. Beckwith; time to expire on the fifth day of December, 1872; then George C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, George C. Beckwith to retain one half, and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith.

"[Signed] C. W. Talbot.
"Elton T. Beckwith.
"Edwin F. Beckwith."

This agreement was signed by the plaintiff and the two young Beckwiths, but was not signed by the defendant. It was delivered to him, however, and was kept by him until he produced and proved it on the trial. It was conceded by both parties that this was the agreement under which the services of the plaintiff were performed.

Two letters written by the defendant to the plaintiff on the subject-matter of the contract, and whilst he had the said agreement in his possession, and whilst it was being executed by the plaintiff, namely, one on the 21st of September, 1872, and the other on the 10th of November, 1872, were also produced in evidence; from which the following are extracts:

"Denver, Sept. 21, 1872.

"Mr. Talbot—Sir: On my arrival from the mountains, I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low. * * * I have used every exertion for the last three months to sell. * * *

"You suggest giving you a part of the cattle. That is entirely outside of the agreement. Also, where would be the interest on the amount put in the cattle coming from? And also Elton and Edwin would be glad to do the same; but at that rate I would not get my money back I put into the cattle.

"The cattle must be sold and settled up according to the agreement. I will do every thing I can to sell at the best advantage, and you shall have every chance to get a purchaser for the cattle so as to make the most out of them. * * *

"You shall have no chance to complain in my keeping up to the agreement, as I shall strictly, although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so said so too. * * *

"Yours respectfully, George C. Beckwith."

"Denver, Nov. 10, 1872.

"Mr. Talbot—Sir: At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time. * * * I notified you to get a purchaser for the cattle months ago; and what have I received from you in return and for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say any thing to you or any one else?

"But what next? You quarrelled with me because I would not break the agreement and give you the cattle to sell at figures less than I had kept them in Denver for sale. Now, I have been offered $31,000 for the cattle. I have written to Edwin, and he will state to you what I wrote him to say to you.

"Yours, in haste, George C. Beckwith."

We agree with the Supreme Court of Colorado that, in the face of this evidence, produced by the defendant himself, he cannot deny the validity of the agreement. His letters are a clear recognition of it. In them he refers to "the agreement" again and again. He declares his intention to adhere to it, and to hold the plaintiff to it. What agreement could he possibly refer to but the only one which, so far as appears, was ever made: the one which he took into his possession, and then had in his possession; the one under which it was conceded the parties were then acting? The defendant, being examined as a witness on his own behalf, and testifying with regard to the contract between the parties, said, "The matter was all talked over, and, I thought, understood. I said to my son Elton, 'You understand the matter. Will you take a pen and paper and write the contract?' He wrote it. Talbot read it and signed it, and then my sons signed it." On cross-examination, he said, "The contract was delivered to me after it was signed, and has remained in my possession ever since until this trial."

It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the Statute of Frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. Johnson v. Dodgson, 2 Mee. & W. 653; Salmon Falls Co. v. Goddard, 14 How. 446, 14 L. Ed. 493. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day, the latter writes to the party who signed it as follows: "My son informs me that you yesterday executed our proposed agreement, as prepared by J. S. I write this to let you know that I recognize and adopt it." Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet parol proof would be required to show what agreement was meant. The present case is as strong as that would be. In our judgment, the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign, and which he put in his pocket and kept, and sought to enforce against the plaintiff for two whole years.

On this point, therefore, we are clearly of opinion that no error was committed by the court below. * * *

Judgment affirmed.

## BROWN v. WHIPPLE.

(Supreme Court of New Hampshire, 1877. 58 N. H. 229.)

Assumpsit, for not accepting lumber. Verdict for the plaintiff: motion of the defendant for a new trial. As evidence of the memorandum required by the statute of frauds, the plaintiff introduced, subject to exception, a letter written and signed by the defendant, a memorandum written by the defendant, and a letter written and signed by the plaintiff.

The Defendant's Letter.

"Lancaster, Dec. 21, 1867.

"J. B. Brown, Esq.—Dear Sir: Can you get 20 M. feet maple, the best quality, the coming winter, saw it in the spring (or winter), and deliver it at the depot at your place in July next? If so, for how much per M.? Please call at my place when you are at Lancaster, and we will talk it over, or write me all the particulars.

"Respectfully yours, J. M. Whipple."

The Defendant's Memorandum.

"Rock maple, clear, for J. M. Whipple, 15,000 feet; 10,000 feet 2 inches thick; 5,000 feet 1¼ inches thick. To be delivered at the railroad track. Price, $20 per M."

The Plaintiff's Letter.

"May, 1868.

"John M. Whipple: The maple lumber which I agreed to get out for you is ready for delivery. Would like to have you call up and take the account of it, as I wish to draw it over to the railroad track. James B. Brown."

Doe, C. J. When one document refers to another, the latter is, for the purpose of such reference, incorporated with the former. 1 Starkie, Ev. 359 (page 580 of 4th Eng. Ed.); Simons v. Steele, 36 N. H. 73, 83; Church v. Brown, 21 N. Y. 315, 330–334. A list of taxes may, by annexation and reference, be made a part of a tax-collector's warrant. Bailey v. Ackerman, 54 N. H. 527. In Tallman v. Franklin, 14 N. Y. 584, it was held that a document was made a part of a memorandum by being fastened to it by a pin before the memorandum was signed, a blank column of the memorandum being headed "Terms of Sale," and the annexed document having the same heading, and containing terms of sale.

In this case, the letter written by the plaintiff to the defendant is no part of the memorandum required by the statute of frauds, because it is neither signed by the defendant, nor made, by annexation or reference, a part of a writing signed by him. 2 Kent, Com. 511; Benjamin on Sales, §§ 222–237; Blackburn on Sales, §§ 46–54; authorities cited in Morton v. Dean, 13 Metc. (Mass.) 385, and in Browne on Statute of Frauds, §§ 346–348, 371–376; Fitzmaurice v. Bayley, 9 H. L. Cas. 78; Skelton v. Cole, 1 De Gex & J. 587.

If it was held, in S. F. M. Co. v. Goddard, 14 How. 446, 14 L. Ed 493, and in Lerned v. Wannemacher, 9 Allen (Mass.) 412, that, by a writing signed by the plaintiff, not signed by the defendant (the party to be charged), and not made a part of a memorandum signed by the defendant, the plaintiff may prove a fact which the statute requires to be proved by a memorandum signed by the defendant, those cases are in conflict with a mass of authority too great to be overthrown. The soundness of the contrary doctrine was, in the former case, demonstrated to the dissenting opinion of two judges, and was, in the latter case, substantially admitted.

In Beckwith v. Talbot, 95 U. S. 289, 292, 24 L. Ed. 496, it was a question of legal construction whether the written agreement, signed by the plaintiff, was sufficiently identified and referred to by the defendant, in his letters, to make it a part of a memorandum signed by him. It was held that the general rule is, that collateral papers, adduced to supply the defect of signature of a written agreement, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. In what was said of an exception in cases where parol evidence leaves no ground for doubt, we do not concur. Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. Williams v. Morris, 95 U. S. 444, 456, 24 L. Ed. 360. A defective reference can no more be cured by parol than any other defective part of the memorandum.

The writing, called in this case the defendant's memorandum, is insufficient, because, if it is signed by the defendant, and if it shows that he bought lumber of some one, it does not show of whom he bought it. The defendant's letter of inquiry is insufficient, because it does not show that he bought or agreed to buy anything of anybody. If the necessary memorandum were described in the statute (Gen. St. c. 201, § 14) as a scintilla of proof of the essentials of the bargain, and if the question were, whether, in fact, the plaintiff is the person with whom the defendant contracted, one question of law would be, whether the defendant's memorandum and letter (with or without other evidence) are competent for the consideration of the jury. But the question is, not whether there is an infinitesimal or other amount of circumstantial evidence from which a jury may find the fact not stated in the writings, but whether the court does find, upon a fair legal construction of the writings, that the fact is stated in them.

Taken together, with all the meaning that is expressed, and all that can be implied, by the most strained construction, in favor of the plaintiff, the defendant's memorandum and letter state, that at some time the defendant agreed to buy of somebody 15,000 feet of clear rock maple boards of certain dimensions, to be delivered at the railroad track, at $20 a thousand; and that, on the 21st day of December, 1867, the defendant inquired of the plaintiff, by letter, whether he could get, for the defendant, 20,000 feet of the best maple lumber, the coming winter, saw it in the winter or spring, and deliver it at the depot at the plaintiff's place the next July,—and at what price the plaintiff would do this. We do not think the legal import of this statement is, that the plaintiff is the person with whom the defendant contracted.

A memorandum (consisting of one or more writings) may be read, like other documents, in the light of the circumstances in which it was written, for the explanation of its latent ambiguities, and the application of its terms to the persons and things sufficiently described in it. But this rule does not admit parol evidence to supply an essential part of the contract, the omission of which is patent on the face of the memorandum. And the inequitable operation of the statute is not to be avoided by a narrow construction of the law, or a liberal construction of the memorandum. Arguments from inconvenience and injustice sometimes tend to show the law-makers' intention. But there is reason to fear, that, in this country as well as in England, the favor with which some statutes, and the dislike with which others, have been regarded by courts, have enlarged the distinction between strict and loose construction, without reference to the legislative intent, and introduced a variable standard that exposes the province of the legislature to judicial invasion.

Verdict set aside.

FOSTER, J., did not sit.

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## LERNED et al. v. WANNEMACHER et al.

(Supreme Judicial Court of Massachusetts, 1864. 9 Allen, 412.)

Contract brought to recover damages for the failure to deliver a quantity of coal, sold by the defendants to the plaintiffs. One ground of defence was, that the contract was not binding because not executed in conformity to the statute of frauds.

At the trial in the superior court, before Morton, J., the plaintiffs introduced evidence tending to show the following facts: Albert Betteley was authorized to sign contracts for the sale of coal, in behalf of the defendants, who were commission merchants in Philadelphia, under the firm of Wannemacher & Maxfield. On the 31st of March, 1863, the plaintiffs made a parol contract for the purchase of one thousand tons of coal of Betteley, as agent of the defendants, according to the terms of the written memorandum hereinafter set out. The plaintiffs then signed and delivered to Betteley, as agent of the defendants, a memorandum of the contract, partly written and partly printed, as follows, the written parts being here put in italics:

"Coal, when delivered on board of vessels, boats or barges, to be in all respects at the purchaser's risk; bills of lading, or other regular testimony of shipment, to be proof of such delivery, both as to time and quantity. Each cargo of coal to be settled for from time to time as delivered, in the mode specified in the contract. Captains of vessels sent by purchasers for their coal, to bring written orders, and take each his regular turn in loading. All possible despatch will be given in loading, but no claims will be allowed for demurrage, nor for the consequences of unavoidable delay. No responsibility assumed as regards procuring vessels, boats or barges; but every exertion will be used to engage them. Every effort will be made for the fulfillment of this contract; but if prevented or obstructed by breaches, or other unavoidable occurrences, on the canals or railroads, or at the mines, or by combinations, strikes or turn-outs among miners, boatmen or laborers, no claim for damages will be allowed. Wannemacher & Maxfield, commission merchants, Philadelphia.

*Boston, March* 31, 1863.

"On the above terms and conditions, please deliver on board, at your wharves at *Philadelphia,* to be shipped to *Cambridgeport, 10* feet of water, *7 bridges, 1000 tons..........Swatara; 800 Stove, 200 Egg*; *Swatara $4.50.*

"Terms cash, or approved paper at interest, added from date of bill of lading, or other proof of shipment; *United States tax to be added. We will send our own vessels. After first cargo is shipped, the purchaser has the right to refuse the balance if not satisfactory.*

*"T. P. Lerned & Son."*

At the same time Betteley signed the name of "Wannemacher & Maxfield, by Albert Betteley," to a memorandum precisely similar to the above in every respect, except that the name of the plaintiffs was not signed to it, and delivered the same to the plaintiffs. Two or three weeks afterwards Betteley, as agent of the defendants, wrote upon the back of the memorandum delivered to him by the plaintiffs these words: "To be shipped immediately, if vessels are not sent;" and the plaintiffs signed the same, and redelivered the memorandum to him. Both of the above papers were put in evidence by the plaintiffs, the one signed by them being produced by the defendants on notice. The price of coal subsequently increased in the market, and the defendants refused to deliver the said one thousand tons.

Upon the introduction of this evidence, the judge ruled that the action could not be maintained, and a verdict was accordingly taken for the defendants. The plaintiffs alleged exceptions.

Hoar, J. The ruling to which exceptions were taken at the trial was this: that the plaintiffs could not maintain their action upon the contract set forth in the declaration, because it was a contract for the sale of merchandise for the price of more than fifty dollars, and there was no acceptance of any part of the goods, or giving anything in earnest to bind the bargain, of part payment, and no sufficient note or memorandum in writing of the bargain made and signed by the defendants, or by any person thereunto by them lawfully authorized. Gen. Sts. c. 105, § 5. And the question before us is of the sufficiency of the memorandum produced.

The first objection is, that neither the memorandum signed by the purchasers and delivered to the sellers, nor the counterpart signed by the sellers and delivered to the purchasers, contains in itself a complete statement of the bargain; that there is nothing in the papers themselves by which they can be connected, and it is not sufficient to connect them by parol; and that if connected they are only orders, and do not amount to a contract.

On examining the memorandum retained by the sellers, which is signed by the plaintiffs, we think it is a complete memorandum of the bargain proved, and would undoubtedly have been sufficient in an action by the defendants against the plaintiffs. It must be observed that the contract itself, and the memorandum which is necessary to its validity under the statute of frauds, are in their nature distinct things. The statute presupposes a contract by parol. Marsh v. Hyde, 3 Gray, 333. The contract may be made at one time, and the note or memorandum of it at a subsequent time. The contract may be proved by parol, and the memorandum may be supplied by documents and letters, written at various times, if they all appear to have relation to it, and if coupled together, they contain by statement or reference all the essential parts of the bargain, signed by the party to be charged or his agent. Williams v. Bacon, 2 Gray, 387.

Now it was proved by parol testimony that the contract declared on was made orally by the defendants, through their agent, with the plaintiff; and that the memorandum was delivered to the defendants by the plaintiffs as a statement of the terms of the bargain. In the printed part, it is spoken of as "this contract," and "the contract." It recites that "every effort will be made for the fulfilment of this contract." It then contains a request to the defendants to deliver the coal, "on the above terms and conditions," "at your wharves at Philadelphia"—the defendants' place of business—"to be shipped to Cambridgeport"—the plaintiffs' place of business. The quantity, price, and terms of payment are then stated. It says, "we will send our own vessels," an agreement to receive; and concludes with an option to "the purchaser" to refuse all but the first cargo if that is not satisfactory. That there is a contract, a seller, a purchaser, a thing sold, a price, a place of delivery, and terms of payment, all sufficiently appear. It is true that part of the paper is in form an order; but we can have no doubt that, taking the whole together, it shows an agreement to purchase. As was said by Mansfield, C. J., in Allen v. Bennet, 3 Taunt. 169: "The defendant's counsel distinguishes between an order and an agreement to buy; but if I go to a shop and order goods do not I agree to buy them?"

The only defect, then, is the want of the signature of the defendants or that of their authorized agent. If this had been the only paper executed, it would deserve serious consideration, whether, if shown to have been made as a memorandum of a bargain concluded between the parties, delivered as such by the plaintiffs, and accepted as such by the agent of the defendants, the printed name of the defendants would not have been sufficient, upon the authorities, to answer the requirements of the statute as a signature by them. Saunderson v. Jackson, 3 Esp. R. 180; s. c. 2 B. & P. 238.

But we do not put the case on this ground, because the counterpart of the contract, delivered by the defendants to the plaintiffs, is signed by them through their agent Betteley. As a separate paper, that is in its turn defective, by reason of not containing the name of the purchaser. But the two papers were prepared at one time, and delivered simultaneously as parts of the same transaction. The one produced by the plaintiffs is signed so as to charge the defendants. They gave to the defendants one by which they were themselves bound. The two show clearly, when construed by their own language as applied to the existing circumstances, which party was the seller, and which the purchaser. And we can see no reason upon principle or authority why they should not have the same effect, as if both the signatures were to the same paper. The intrinsic evidence which they afford that they refer to the same transaction is very strong, and competent for the consideration of a jury; and, in the absence of all proof that a precisely similar contract was made by either party with any other person, would be extremely cogent.

The case does not much resemble any of those cited for the defendants, in which the doctrine has been stated that when the memorandum is made out from several papers they must be shown upon their face to have a mutual relation to each other; and that this relation cannot be established by extrinsic evidence. This is the rule of the text books (2 Kent, Com. [6th Ed.] 511; Browne on St. of Frauds, § 350); and its general correctness is well settled (Morton v. Dean, 13 Metc. 385). Most of the cases to which we have been referred have been those of sales at auction, where the conditions of sale were not contained in or annexed to the memorandum which was signed. Here the whole terms and conditions of the bargain are stated alike in the two copies of the memorandum, one of which is signed by each party.

There are, however, two specific objections which deserve attention. In each paper the statement is made, "We will send our own vessels;" and as they are signed, one by the plaintiffs and the other by the defendants, it is urged that the meaning of the word "we" becomes uncertain, or that the two parts of the memorandum are made contradictory. Beside this, one part of the contract was altered by the additional agreement written by the defendants' agent and signed by the plaintiffs, "to be shipped immediately if vessels are not sent;" and no corresponding alteration has been signed by the defendants.

The first difficulty seems to be capable of a satisfactory solution. The printed part of the memorandum clearly contemplates that the shipment of the coal is to be made in vessels to be furnished by the vendors; although they assumed no responsibility about the vessels except reasonable diligence in procuring them. The insertion of the written clause, "we will send our own vessels," could only be explained as importing a change in this respect. In the part of the contract signed by the plaintiffs, "we" would mean the purchaser. In the other part the phrase follows the expression "your wharves," when speaking of the wharves of the defendant; and "we" is thus used in contradistinction from "you," the vendors. The agent of the vendors signs the paper; but still, if not with perfect grammatical correctness of expression, it is sufficiently obvious that in using the word "we" he means the purchasers.

The additional clause written upon the part of the memorandum retained by the defendants presents a more difficult question, though it shows very clearly who were meant by "we" in the part of the contract just considered. But it is obvious that it was not meant to impair the contract which had been made. It is an additional stipulation to take effect upon a contingency which has not happened. The evidence showed that vessels were sent by the plaintiffs. And if the contingency had happened, it was only the substitution of a new mode of performance, of which the defendants or plaintiffs might have availed themselves, even if made only by parol. Cummings v. Arnold, 3 Metc. 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. 31. If it were not binding on the defendants, because no memorandum of it was signed by them, it could not prevent the plaintiffs from enforcing the original contract. It is obviously inadmissible for the defendants to set it up as changing the contract, as evidenced by the completed memorandum, and at the same time to deny its obligation for want of their own signature.

It was held by the English Court of Exchequer, in the recent case of Bluck v. Gompertz, 7 Welsb., Hurlst. & Gord. 862, that where a correction was made upon the memorandum of a contract by the defendant, and signed only by the plaintiff, the original signature of the defendant was a sufficient signing under the statute. That decision would be applicable to the present case, if the memorandum had been contained in one paper, or if the indorsement had been made upon the part containing the signature of the defendants' agent. It is more doubtful whether it can be held to have the same effect where the memorandum is contained on separate papers, and we do not put the decision on that ground.

The other grounds of exception taken at the trial have not been insisted on by the plaintiff's counsel, and are clearly untenable.

Exceptions sustained.

## STEAD v. DAWBER et al.

(Court of Queen's Bench, 1839. 10 Adol. & E. 57.)

Lord DENMAN, C. J.,[52] in this term, (May 7th), delivered the judgment of the Court.

This was an action to recover damages for the non-delivery of a cargo of bones. By the sold note, they were to be shipped on the 20th to the 22d of May, and to be paid for by an acceptance at three months from the delivery. The 22d happened to be on a Sunday; and, a conversation taking place between the defendant and the plaintiff's agent respecting this, upon the suggestion of the defendant, the Monday or Tuesday immediately following, were substituted as the days of delivery. The agent who proved this, also stated that the time for giving the acceptance would, in consequence, be also proportionably enlarged. The main question at the trial, and before us, was, whether this enlargement of the time was an alteration of the contract, or only a dispensation with its performance as to time. The declaration, after setting out the original contract, stated that the plaintiff, at the special instance of the defendants, gave them time for the delivery to the 24th May, and averred a demand on the 24th. The fourth plea alleged that this giving time was parcel of a contract within the Statute of Frauds; that there was no acceptance wholly or in part, or any earnest, or part payment; and that there was no note or memorandum in writing of it: and the replication traversed its being parcel of the contract.

The principles on which this case must be decided, are clear and admitted. The contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude. Many cases were cited in the argument on both sides, the plaintiff's counsel rely chiefly on Cuff v. Penn, 1 M. & S. 21; the defendants' on Goss v. Lord Nugent, 5 B. & Ad. 58, the decision in which it is certainly not easy to reconcile with that in the former. But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to, for substituting the 24th for the 22d, as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects, except those of the day of delivery, and date of the accepted bill, with the old one? Where the variation is so slight as in the present case, and the consequences so serious, the mind comes reluctantly to this conclusion; and this reluctance is increased by considering in how many instances of written contracts within the Statute of Frauds, slight variations are made at the request of one or other of the parties, without the least idea, at the time, of defeating the illegal remedy or the original contract. But the same principle must be applied to the variation of a day and a week or a month; and it seems impossible to suppose that, when the plaintiff had agreed to substitute the 24th for the 22d, either party imagined that an action could be brought for a non-delivery on the 22d, or that a delivery on the 24th would not be a legal performance of the contract existing between them.

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[52] The statement of facts is omitted.

It was urged by the plaintiff's counsel that the defendant's argument reduced him to an inconsistency; that he alleged, on the one hand, an alteration of the contract by parol, and yet, on the other, asserted that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver, or the partial alteration of a written contract, not under seal by parol agreement; and in contemplation of law, such a contract so altered subsists between these parties: but the statute intervenes, and, in the case of such a contract, takes away the remedy by action. It cannot be said that the time of delivery was not originally of the essence of this contract: the evidence shews that the value of the article was fluctuating; and the time of payment was to be calculated from the time of delivery. Where these circumstances exist, it cannot in strict reasoning be argued, as was said by Lord Ellenborough, in the case of Cuff v. Penn, 1 M. & S. 21, that the contract remained, although there was an agreed substitution of other days than those originally specified for its performance. Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days; for the same consideration which existed for the old agreement, is imported into the new agreement, which is substituted for it.

Putting, therefore, that construction on what passed between these parties which best effectuates their intention, and giving also full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and consequently, that the verdict on the fourth plea should be entered for the defendants.

Rule absolute accordingly.[53]

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[53] In Marshall v. Lyon, 6 M. & W. 109 (1840), Parke, B., said that "the case of Cuff v. Penn, which had before been very much doubted, appears to have been overruled by Stead v. Dawber."

## NOBLE v. WARD et al.

(Exchequer Chamber, 1867. L. R. 2 Exch. 135.)

WILLES, J.[54] This is an appeal from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial. The action was brought for non-acceptance of goods pursuant to a contract dated the 18th of August, by which the goods were to be delivered in a certain time. The defendants pleaded that the contract was rescinded by mutual consent. At the trial, they established that, on the 27th of September, before any breach of that contract, it was agreed between the plaintiff and the defendants that a previous contract of the 12th of August should be rescinded (as to which no question is made), that the time for delivering under the contract of the 18th should be extended for a fortnight; and other provisions were made as to taking back certain goods, which we need not further notice. The contract of the 27th of September, however, was invalid, for want of compliance with the formalities required by section 17 of the Statute of Frauds. The defendants contended that the effect of the contract to extend the time for delivery was to rescind the contract of the 18th of August; and if the former contract had been in a legal form, so as to be binding on the parties, that contention might have been successful, so far as a change in the mode of carrying out a contract can be said to be a rescission of it; but the defendants maintained that the effect was the same, although the contract was invalid.

In setting aside the nonsuit directed by the learned judge who tried the cause, the Court of Exchequer dissented from that view, and held that what took place on the 27th must be taken as an entirety, that the agreement then made could not be looked on as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. Mr. Holker has contended, that though the contract of the 27th of September cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind simpliciter, we are to say that what would have resulted if the contract had been valid, will take place though the contract is void; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended, though without expressing it, although it cannot operate as they intended and expressed. But it would be at least a question for the jury, whether the parties did intend to rescind—whether the transaction was one which could not otherwise operate according to their intention; and a material fact on that point is, that, while they expressly rescinded the contract of the 12th of August, they simply made a contract as to the carrying into effect that of the 18th, though in a mode different from what was at first contemplated.

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[54] Part of the opinion is omitted.

It is quite in accordance with the cases of Doe d. Egremont v. Courtenay, 11 Q. B. 702, and Doe d. Biddulph v. Poole, 11 Q. B. 713, overruling the previous decision of Doe d. Egremont v. Forwood, 3 Q. B. 627 (see 11 Q. B. 723), to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. And if direct authority were wanted to sustain this conclusion, it is supplied by Moore v. Campbell, 10 Ex. 323, 23 L. J. (Ex.) 310, where, upon a plea of rescission, the very point was taken by Sir Hugh Hill, who would no doubt have made it good had it been capable of being established. With reference to his argument that the contract was rescinded, Parke, B., said 10 Ex. at p. 332: "We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely, which the plea, we think, imports. If a new valid agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance, of part or all." And he adds: "This was decided by the cases of Stead v. Dawber, 10 Ad. & E. 57, and Marshall v. Lynn, 6 M. & W. 109." * * *

Blackburn, Mellor, Montague, Smith, and Lush, JJ., concurred.

Judgment affirmed.

## CUMMINGS et al. v. ARNOLD et al.

(Supreme Judicial Court of Massachusetts, 1842. 3 Metc. 486, 37 Am. Dec. 155.)

Wilde, J.[55] This case comes before us on exceptions to the rulings of the court at the trial, whereby the evidence offered by the defendants was rejected on the ground that the facts offered to be proved would not constitute a legal defence. The action is founded on a written contract, by which the defendants undertook to deliver to the plaintiffs, at a stipulated price, a certain quantity of cloths for printing, from time to time, between the 26th day of October, 1838, and the first of March following.

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[55] The statement of facts and part of the opinion are omitted.

The defendants admit that the written contract was not performed by them according to the terms of it; and they rely on two oral agreements, made subsequently to the execution of the written contract, by the last of which it was agreed that the plaintiffs should pay cash for the goods to be sent to them by the defendants—they discounting 5 per cent. on the stipulated price, whenever the goods sent should amount to the value of $1000, not before paid for; that, under this last verbal agreement, the defendants delivered 150 pieces of goods, and that the plaintiffs refused to perform said agreement on their part. The defendants also offered to prove that each of these verbal agreements was made on a legal and good consideration. The question is, whether these facts, if proved, would constitute a legal defence to the action.

The general rule is, that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as varied by and merged in the written contract. But this rule does not apply to a subsequent oral agreement made on a new and valuable consideration, before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether.

This rule is laid down by Lord Denman, in Goss v. Lord Nugent, 5 Barn. & Adoph. 65, as a well established principle, in these terms: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."

The same principle, substantially, is maintained by numerous cases both in England and in this country. * * *

But the plaintiffs' counsel contends, that however the general principle may be, as to the effect of a parol agreement on a previous written contract, it is not applicable to the present case, the parol agreement being void by the statute of frauds; and that to allow a parol agreement to be engrafted upon a written contract, would let in all the inconveniences which were intended to be obviated by the statute. In considering this objection, we have met with many conflicting decisions, but for which, we should have had but little difficulty in disposing of the question raised. And notwithstanding the doubts excited by some of these decisions, we have been brought to a conclusion, which coincides, as we think, with the true meaning of the statute. The language of the 4th section, (Rev. Sts. c. 74) on which the question depends, is peculiar. It does not require that the note or memorandum in writing of the bargain should be signed by both the contracting parties, but only "by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

"The principal design of the statute of frauds was," as Lord Ellenborough remarks, in Cuff v. Penn, 1 M. & S. 26, "that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase." The statute, therefore, requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts. We have no doubt, therefore, that accord and satisfaction, by a substituted performance, would be a good defence in this action. So if the plaintiffs had paid for the goods, according to the oral agreements to pay cash or give security, and the defendants had thereupon completed the delivery of the goods contracted for, it would have been a good performance of the written contract. This has been prevented, (if the defendants can prove what they offered to prove,) by the plaintiffs' refusal to perfom on their part a fair and valid contract. And it is a well settled principle, that if two contracting parties are bound to do certain reciprocal acts simultaneously, the offer of one of the parties to perform the contract on his part, and the refusal of the other to comply with the contract on his part, will be equivalent to a tender and refusal; and in the present case, we think it equivalent to an accord and satisfaction, which was prevented by the fault of the plaintiffs, who agreed, for a valuable consideration—if what the defendants offered to show be true—to vary the terms of the written contract as to the time of payment, and afterwards refused to comply with their agreement. If the defendants on their part had refused to perform the verbal agreement, then indeed it could not be set up in defence of the present action; for the party, who sets up an oral agreement for a substituted performance of a written contract, is bound to prove that he has performed, or has been ready to perform, the oral agreement.

This distinction avoids the difficulty suggested in some of the cases cited, where it is said, that to allow a party to sue partly on a written and partly on a verbal agreement, would be in direct opposition to the requisitions of the statute; and it undoubtedly would be; but no party having a right of action can be compelled to sue in this form. He may always declare on the written contract; and unless the defendant can prove performance according to the terms of the contract, or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment. We think, therefore, that the evidence of the oral agreements, offered at the trial, should have been admitted; the same not being within the statute of frauds, and the evidence being admissible by the rules of law.

In support of this view of the case, I shall not attempt to reconcile all the conflicting opinions which have been held in similar or nearly similar cases, some of which appear to have been decided on very subtle and refined distinctions. I will, however, refer to a few decisions which bear directly on the present case. The case of Cuff v. Penn, 1 M. & S. 21, is a strong authority in favor of the defendants, as the facts, on which the decision in that case depended, are in all respects substantially similar to those offered to be proved in this action. That was an action of assumpsit for not accepting a quantity of bacon, which by a written contract the defendant agreed to purchase of the plaintiff, to be delivered at certain fixed times. After a part of the bacon had been delivered, the defendant requested the plaintiff, as the sale was dull, not to press the delivery of the residue, and the plaintiff assented. The defendant afterwards refused to accept the residue, and set up the statute of frauds in defence; but the court held, that there was a parol dispensation of the performance of the written contract as to the times of delivery, which was not affected by the statute of frauds. Lord Ellenborough says, "I think this case has been argued very much on a misunderstanding of the statute of frauds, and the question has been embarrassed by confounding two subjects quite distinct; namely, the provision of the statute, and the rule of law whereby a party is precluded from giving parol evidence to vary a written contract." "It is admitted," he adds, in an other part of his opinion, "that there was an agreed substitution of other days than those originally specified for the performance of the contract; still the contract remains. Suppose a delivery of live hogs instead of bacon had been substituted and accepted; might not that have been given in evidence as accord and satisfaction? So here the parties have chosen to take a substituted performance."

The principle on which this case was decided is laid down in several other cases, some of which have been already cited on the other point of defence.

At the argument of the case of Goss v. Lord Nugent, Parke, J., remarked, that "in Cuff v. Penn, and some other cases relating to contracts for the sale of goods, above £10, it has been held, that the time in which the goods, by the agreement in writing, were to be delivered, might be extended by a verbal agreement. But I never could understand the principle on which those cases proceeded; for the new contract to deliver within the extended time must be proved partly by written and partly by oral evidence." But there is no necessity for the plaintiff to declare partly on the written and partly on the oral agreement. He may always, as before remarked, declare on the written contract, and the defendant will be bound to prove a performance according to the terms of it, or according to the terms of a substituted performance; and performance in either way may be proved by parol evidence. McCombs v. McKennan, 2 Watts & S. (Pa.) 218, 37 Am. Dec. 505.

Lord Denman, who delivered the opinion of the court in Goss v. Lord Nugent, does not question the correctness of the decision in Cuff v. Penn; and his remarks on another branch of the statute of frauds seem to be confirmatory of the principle laid down by Lord Ellenborough in the latter case. "It is to be observed," he says, "that the statute does not say in distinct terms, that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing; and there is no clause which requires the dissolution of such contracts to be in writing." In that action, however, the plaintiff declared partly on the written and partly on the verbal contract, and on that ground it was rightfully enough decided that the action could not be maintained.

In Stowell v. Robinson, 3 Bing. N. R. 928, and 5 Scott, 196, it was held, that the time for the performance of a written contract for the sale of lands could not be enlarged by a subsequent oral agreement, although that agreement was pleaded by the defendant as a bar to the action. The plea was, that at the time stipulated for the performance of the written contract, neither party was ready to complete the sale; and the time for the performance was agreed by the parties to be postponed. That decision seems to be founded on the doubt suggested by Parke, J., in Goss v. Lord Nugent, and upon the decision in that case, without noticing the distinction in the two cases. And it appears to us, that the case of Stowell v. Robinson was decided on a mistaken construction and application of the statute of frauds; and that the distinction between the contract of sale, which is required to be in writing, and its subsequent performance, as to which the statute is silent, was overlooked, or not sufficiently considered by the court; otherwise, the decision perhaps might have been different. We think there is no substantial difference, so far as it relates to the statute of frauds, between the plea in that case and the plea of accord and satisfaction, or a plea that the written contract had been totally dissolved, before breach, by an oral agreement; either of which pleas would have been a good and sufficient bar to the action. We are aware that the principle on which Stowell v. Robinson was decided, is supported by other English cases cited; but the principle on which the case of Cuff v. Penn was decided, is in our judgment more satisfactory, and better adapted to the administration of justice in this and similar cases.

It is to be observed in the present case, that the oral agreements, offered to be proved by the defendants, did not vary the terms of the written contract as to its performance on their part; the only alteration was as to the time of payment by the plaintiffs. Such an alteration, made on a good consideration, and before any breach of the contract, may, we think, be proved, without any infringement of the statute of frauds or any principle of law.

New trial granted.[56]

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[56] For a criticism of this case, see **Williston**, Sales, § 121.

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# APPENDIX

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## SALES ACT

### AN ACT TO MAKE UNIFORM THE LAW RELATING TO THE SALE OF GOODS

[As Approved by the Commissioners on Uniform State Laws]

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### PART I

#### *Formation of the Contract*

**Section 1.—[Contracts to Sell and Sales.]** (1.) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2.) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3.) A contract to sell or a sale may be absolute or conditional.

(4.) There may be a contract to sell or a sale between one part owner and another.

**Section 2.—[Capacity—Liabilities for Necessaries.]** Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

#### *Formalities of the Contract*

**Section 3.—[Form of Contract or Sale.]** Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

**Section 4.—[Statute of Frauds.]** (1.) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by word or conduct his assent to becoming the owner of those specific goods.

### *Subject-Matter of Contract*

**Section 5.—[Existing and Future Goods.]** (1.) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2.) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

**Section 6.—[Undivided Shares.]** (1.) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2.) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass, is undetermined. By such a sale the buyer becomes owner in common of such a share or the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

**Section 7.—[Destruction of Goods Sold.]** (1.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated, in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a.) As avoided, or

(b.) As transferring the property in all the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

**Section 8.—[Destruction of Goods Contracted to be Sold.]** (1.) Where there is a contract to sell specific goods, and subsequently but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a.) As avoided, or

(b.) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

### *The Price*

**Section 9.—[Definition and Ascertainment of Price.]** (1.) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2.) The price may be made payable in any personal property.

(3.) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

**Section 10.—[Sale at a Valuation.]** (1.) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

### *Conditions and Warranties*

**Section 11.—[Effect of Conditions.]** (1.) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2.) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

**Section 12.—[Definition of Express Warranty.]** Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

**Section 13.—[Implied Warranties of Title.]** In a contract to sell or a sale, unless a contrary intention appears, there is—

(1.) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3.) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4.) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

**Section 14.—[Implied Warranty in Sale by Description.]** Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

**Section 15.—[Implied Warranties of Quality.]** Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2.) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.

(3.) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4.) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6.) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

### *Sale by Sample*

**Section 16.—[Implied Warranties in Sale by Sample.]** In the case of a contract to sell or a sale by sample:

(a.) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b.) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c.) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

## PART II

### Transfer of Property and Title

### *Transfer of Property as Between Seller and Buyer*

**Section 17.—[No Property Passes until Goods are Ascertained.]** Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

**Section 18.—[Property in Specific Goods Passes When Parties so Intend.]** (1.) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

**Section 19.—[Rules for Ascertaining Intention.]** Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1.) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2.) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1.) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods, have been delivered to the buyer or reached the place agreed upon.

**Section 20.—[Reservation of Right of Possession or Property when Goods are Shipped.]** (1.) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

**Section 21.—[Sale by Auction.]** In the case of sale by auction—(1.) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3.) A right to bid may be reserved expressly by or on behalf of the seller.

(4.) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

**Section 22.—[Risk of Loss.]** Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(a.) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery.

(b.) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

### *Transfer of Title*

**Section 23.—[Sale by a Person Not the Owner.]** (1.) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Nothing in this act, however, shall affect—

(a.) The provisions of any factor's acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b.) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

**Section 24.—[Sale by one Having a Voidable Title.]** Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

**Section 25.—[Sale by Seller in Possession of Goods Already Sold.]** Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

**Section 26.—[Creditors' Rights against Sold Goods in Seller's Possession.]** Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

**Section 27.—[Definition of Negotiable Document of Title.]** A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

**Section 28.—[Negotiation of Negotiable Documents by Delivery.]** A negotiable document of title may be negotiated by delivery:

(a.) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b.) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

**Section 29.—[Negotiation of Negotiable Documents by Indorsement.]** A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

**Section 30.—[Negotiable Documents of Title Marked "Not Negotiable."]** If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

**Section 31.—[Transfer of Non-Negotiable Documents.]** A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

**Section 32.—[Who may Negotiate a Document.]** A negotiable document of title may be negotiated

(a.) By the owner thereof, or

(b.) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

**Section 33.—[Rights of Person to Whom Document has been Negotiated.]** A person to whom a negotiable document of title has been duly negotiated acquires thereby

(a.) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b.) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

**Section 34.—[Rights of Person to Whom Document has been Transferred.]** A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

**Section 35.—[Transfer of Negotiable Document without Indorsement.]** Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

**Section 36.—[Warranties on Sale of Document.]** A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(a.) That the document is genuine.

(b.) That he has a legal right to negotiate or transfer it.

(c.) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d.) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

**Section 37.—[Indorser Not a Guarantor.]** The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

**Section 38.—[When Negotiation Not Impaired by Fraud, Mistake or Duress.]** The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

**Section 39.—[Attachment or Levy upon Goods for Which a Negotiable Document has been Issued.]** If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

**Section 40.—[Creditors' Remedies to Reach Negotiable Documents.]** A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

## PART III

### *Performance of the Contract*

**Section 41.—[Seller must Deliver and Buyer Accept Goods.]** It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

**Section 42.—[Delivery and Payment are Concurrent Conditions.]** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

**Section 43.—[Place, Time and Manner of Delivery.]** (1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other places, then that place is the place of delivery.

(2.) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

**Section 44.—[Delivery of Wrong Quantity.]** (1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full the buyer shall not be liable for more than the fair value to him of the goods so received.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

**Section 45.—[Delivery in Installments.]** (1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

(2.) Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

**Section 46.—[Delivery to a Carrier on Behalf of the Buyer.]** (1.) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, rule 5, or unless a contrary intent appears.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

**Section 47.—[Right to Examine the Goods.]** (1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3.) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

**Section 48.—[What Constitutes Acceptance.]** The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

**Section 49.—[Acceptance does Not Bar Action for Damages.]** In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

**Section 50.—[Buyer is Not Bound to Return Goods Wrongly Delivered.]** Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

**Section 51.—[Buyer's Liability for Failing to Accept Delivery.]** When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

## PART IV

### *Rights of Unpaid Seller against the Goods*

**Section 52.—[Definition of Unpaid Seller.]** The seller of goods is deemed to be an unpaid seller within the meaning of this act—

(a.) When the whole of the price has not been paid or tendered;

(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2.) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

**Section 53.—[Remedies of an Unpaid Seller.]** (1.) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

(a.) A lien on the goods or right to retain them for the price while he is in possession of them;

(b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c.) A right of resale as limited by this act;

(d.) A right to rescind the sale as limited by this act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage "in transitu" where the property has passed to the buyer.

### *Unpaid Seller's Lien*

**Section 54.—[When Right of Lien may be Exercised.]** (1.) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired.

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

**Section 55.—[Lien after Part Delivery.]** Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

**Section 56.—[When Lien is Lost.]** (1.) The unpaid seller of goods loses his lien thereon—

(a.) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

### *Stoppage in Transitu*

**Section 57.—[Seller may Stop Goods on Buyer's Insolvency.]** Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

**Section 58.—[When Goods are in Transit.]** (1.) Goods are in transit within the meaning of section 57—

(a.) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent, in that behalf, takes delivery of them from such carrier or other bailee;

(b.) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2.) Goods are no longer in transit within the meaning of section 57—

(a.) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c.) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer of his agent in that behalf.

(3.) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4.) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

**Section 59.—[Ways of Exercising the Right to Stop.]** (1.) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

### *Resale by the Seller*

**Section 60.—[When and How Resale may be Made.]** (1.) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale. but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3.) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4.) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5.) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

### *Rescission by the Seller*

**Section 61.—[When and How the Seller may Rescind the Sale.]** (1.) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default of the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

**Section 62.—[Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.]** Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

## PART V

## Actions for Breach of the Contract

### *Remedies of the Seller*

**Section 63.—[Action for the Price.]** (1.) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3.) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

**Section 64.—[Action for Damages for Non-Acceptance of the Goods.]** (1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4.) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

**Section 65.—[When Seller may Rescind Contract or Sale.]** Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

### *Remedies of the Buyer*

**Section 66.—[Action for Converting or Detaining Goods.]** Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

**Section 67.—[Action for Failing to Deliver Goods.]** (1.) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the markets or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

**Section 68.—[Specific Performance.]** Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

**Section 69.—[Remedies for Breach of Warranty.]** (1.) Where there is a breach of warranty by the seller, the buyer may, at his election—

(a.) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b.) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c.) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d.) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2.) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3.) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4.) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5.) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6.) The measure of damages for the breach of warranty is the loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

(7.) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

**Section 70.—[Interest and Special Damages.]** Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

## PART VI

### *Interpretation*

**Section 71.—[Variation of Implied Obligations.]** Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

**Section 72.—[Rights may be Enforced by Action.]** Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided be enforced by action.

**Section 73.—[Rule for Cases Not Provided for by this Act.]** In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

**Section 74.—[Interpretation shall Give Effect to Purpose of Uniformity.]** This act shall be so interpreted and construed, if possible, as to effectuate its general purpose, to make uniform the laws of those states which enact it.

**Section 75.—[Provisions Not Applicable to Mortgages.]** The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

**Section 76.—[Definitions.]** (1.) In this act, unless the context or subject matter otherwise requires—

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to the documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor.

(2.) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is "insolvent" within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is solvent within the meaning of the federal bankruptcy law or not.

(4.) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

**Section 77.—[Inconsistent Legislation Repealed.]** All acts or parts of acts inconsistent with this act are hereby repealed.

**Section 78.—[Time when the Act Takes Effect.]** This act shall take effect on the ——— day of ———, one thousand nine hundred and ———.

**Section 79.—[Name of Act.]** This act may be cited as the Sales Act.

# SALE OF GOODS ACT

## AN ACT FOR CODIFYING THE LAW RELATING TO THE SALE OF GOODS

[Chapter 71 of 56 & 57 Victoria, February 20, 1894.]

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## PART I

### FORMATION OF THE CONTRACT

### *Contract of Sale*

1.—(1.) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

(2.) A contract of sale may be absolute or conditional.

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

### *Formalities of the Contract*

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

### *Subject-Matter of Contract*

5.—(1.) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

### *The Price*

8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9.—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

### *Conditions and Warranties*

10.—(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2.) In a contract of sale "month" means prima facie calendar month.

11.—(1.) In England or Ireland—

(a.) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b.) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(c.) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2.) Where goods are bought by description from a seller who deals in goods of that description, (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

### *Sale by Sample*

15.—(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2.) In the case of a contract for sale by sample—

(a.) There is an implied condition that the bulk shall correspond with the sample in quality;

(b.) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c.) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

## PART II

### EFFECTS OF THE CONTRACT

### *Transfer of Property as Between Seller and Buyer*

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17.—(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval, or "on sale or return" or other similar terms the property therein passes to the buyer:

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b.) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19.—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding, the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

### *Transfer of Title*

21.—(1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Provided also that nothing in this Act shall affect—

(a.) The provisions of the Factor's Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b.) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22.—(1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2.) Nothing in this action shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24.—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

25.—(1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods, or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26.—(1.) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

## PART III

### *Performance of the Contract*

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods, and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence; provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.—(1.) Unless otherwise agreed, the buyer of the goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32.—(1.) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Unless otherwise agreed where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

## PART IV

### *Rights of Unpaid Seller against the Goods*

38.—(1.) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(a.) When the whole of the price has not been paid or tendered;

(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

(2.) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a.) A lien on the goods or right to retain them for the price while he is in possession of them;

(b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c.) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

### *Unpaid Seller's Lien*

41.—(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43.—(1.) The unpaid seller of goods loses his lien or right of retention thereon—

(a.) When he delivers the goods to a carrier or other bailee or custodier, for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, by reason only that he has obtained judgment or decree for the price of the goods.

### *Stoppage in Transitu*

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.

### *Re-Sale by Buyer or Seller*

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

## PART V

### ACTIONS FOR BREACH OF THE CONTRACT

### *Remedies of the Seller*

49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

### *Remedies of the Buyer*

51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53.—(1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a.) Set up against the seller the breach of warranty in diminution or extinction of the price; or

(b.) Maintain an action against the seller for damages for the breach of warranty.

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

## PART VI

### *Supplementary*

55. Where any right, duty, or liability, would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. In the case of a sale by auction—

(1.) Where goods are put up for sale by auction in lots, each lot is prima facie deemed to be the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made the bidder may retract his bid.

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer.

(4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract, as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61.—(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62.—(1.) In this Act, unless the context or subject matter otherwise requires—

"Action" includes counterclaim and set-off, and in Scotland condescendence and claim and compensation.

"Bailee" in Scotland includes custodier.

"Buyer," means a person who buys or agrees to buy goods.

"Contracts of sale" includes an agreement to sell as well as a sale.

"Defendant" includes in Scotland defender, respondent, and claimant in a multiple-poinding.

"Delivery" means voluntary transfer of possession from one person to another.

"Document of title to goods" has the same meaning as it has in the Factors Acts.

"Factors Acts" means the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same.

"Fault" means wrongful act or default.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Lien" in Scotland includes right of retention.

"Plaintiff" includes pursuer, complainer, claimant in a multiple-poinding and defendant or defender counterclaiming.

"Property" means the general property in goods, and not merely a special property.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods.

"Specific goods" means goods identified and agreed upon at the time a contract of sale is made.

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2.) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4.) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. This act may be cited as the Sale of Goods Act, 1893.

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